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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-275

OSCAR MAYER & CO., ROBERT M. BOLZ, N. D. OTTENS, DONALD L. PAUL, PAUL F. GOULD,

Petitioners,

vs.

JOSEPH W. EVANS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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vs.

JOSEPH W. EVANS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners Oscar Mayer & Co., Robert M. Bolz, N. D. Ottens, Donald L. Paul, and Paul F. Gould respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on July 6, 1978.

OPINIONS BELOW.

The Opinion of the District Court for the Southern District of Iowa of July 8, 1977, denying petitioners' Motion to Dismiss is reported unofficially at 17 FEP Cases 218 and is reproduced in Appendix A herein (App. A1-A7). The Opinion of the Court of Appeals of April 5, 1978, reversing the trial court, is unofficially reported at 17 FEP Cases 221 and is reproduced in

Appendix A herein (App. A8-A14). The Court of Appeals' Opinion on Rehearing issued on July 6, 1978, withdrawing its Opinion of April 5, 1978, and affirming the trial court, is unreported and is reproduced herein in Appendix A (App. A15-A21).

JURISDICTION.

The opinion by a divided panel of the Court of Appeals was entered on July 6, 1978 (App. A15-A21). Petition for rehearing en banc was denied on July 7, 1978 (App. A22). Jurisdiction is conferred on this Court by 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the Court of Appeals for the Eighth Circuit erred in finding that the commencement of proceedings in a timely fashion before a state agency is not a mandatory prerequisite to the institution of a civil suit under the Age Discrimination in Employment Act, 29 U. S. C. § 621 *et seq.* in states having laws prohibiting age discrimination in employment and establishing agencies empowered to grant or to seek relief from such discriminatory practices.

STATUTES INVOLVED.

This case involves the interpretation and application of Section 14(b) of the Age Discrimination in Employment Act, 29 U. S. C. § 633(b) (hereinafter referred to as the "ADEA") and Section 706(b) of Title VII of the Civil Rights Act of 1964 as amended, 42 U. S. C. § 2000e-5(c). These statutory provisions are reprinted in full in Appendix B (App. A23-A24).

STATEMENT OF THE CASE.

This case raises a question of fundamental importance under the ADEA, *i.e.*, whether resort must be had to a state agency

having jurisdiction over claims of age discrimination before proceeding in the federal district courts.

Petitioner Oscar Mayer & Co. ("Oscar Mayer") is a corporation incorporated under the laws of the State of Delaware, and is licensed to do business in Iowa. It owns and operates a number of plants throughout the country, including a plant in Davenport, Iowa.

Respondent was employed by Oscar Mayer as a hog buyer for 23 years until his retirement on January 31, 1976. Although he was assigned to the Davenport plant, his buying station was located at Williamsburg, Iowa.

On March 10, 1976, respondent filed with the United States Department of Labor a notice of intent to sue under the ADEA, claiming that he was "forced" to retire and that his termination was in violation of the ADEA.

The Iowa Civil Rights Act of 1965, as last amended in 1974, prohibits age discrimination in employment and entrusts enforcement of this Act to the Iowa Civil Rights Commission. Section 601, A. 5, 6, Code of Iowa (1975). Any person claiming to be a victim of unlawful discrimination under this Act must file a complaint with the Commission within 120 days of the alleged discriminatory practices. Section 601, A. 14(1), (15), Code of Iowa (1975).

Despite these statutory provisions, respondent never filed a complaint with the Iowa State Civil Rights Commission. Instead, on March 7, 1977, filed a complaint with the United States District Court for the Southern District of Iowa, Davenport Division, alleging that he was discharged in violation of the ADEA.

Petitioners moved to dismiss the complaint for lack of jurisdiction over the subject matter due to respondent's failure to file a timely complaint of age discrimination with the Iowa State Civil Rights Commission as required by Section 14(b) of the ADEA, 29 U. S. C. § 633(b). On August 8, 1977, this motion

was denied by Judge W. C. Stuart, who held that the filing of an age discrimination claim with a state agency is not a prerequisite to the institution of a civil suit under the ADEA (App. A1-A7).

On appeal, the Court of Appeals for the Eighth Circuit, on April 5, 1978, initially reversed the decision of the district court and held that resort to the state agency was required under the ADEA. Judge Bright, writing for the majority stated:*

> "We conclude that, in a state having laws that prohibit age discrimination and having an agency with authority to seek relief from such practices, filing a charge with the state agency is mandatory under the ADEA and is a prerequisite to the filing of an action in federal court." (App. A11.)

Shortly thereafter, respondent filed a petition for rehearing and suggestion for rehearing en banc. Respondent was supported in his position by the Secretary of Labor, who, on April 26, 1978, was permitted to file an amicus curiae brief. On July 6, 1978, a divided panel of the Court of Appeals withdrew its opinion of April 5, 1978 and affirmed the district court's order. Judge Henley, who originally dissented, wrote the majority Opinion on Rehearing, noting that "the authorities are in conflict, and the question is not free from doubt". He went on to hold, however, that the "preferable view" was that an individual was not required to file a complaint with a state agency before instituting a civil suit. (App. A18-A19.)**

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* Judge Bright was joined in his opinion by Judge Talbot Smith, United States Senior District Judge, Eastern District of Michigan, sitting by designation. Judge Henley dissented.

** Judge Henley was joined by Judge Smith who had concurred in the court's original opinion that an individual was required to file a timely complaint with a state agency before instituting suit under the ADEA. Judge Bright, consistent with his opinion of April 5, 1978, dissented to the Court's opinion of July 6, 1978.

REASONS FOR GRANTING THE WRIT.

I. A Clear Division of Opinion Exists Between the Circuit Courts of Appeal on the Issues Presented by This Petition.

At the present time, four other circuit courts of appeal have been faced with the question of the proper interpretation of Section 14(b). They have divided evenly on this issue. The Courts of Appeal for the Third and Sixth Circuits have issued decisions consistent with the court below. *See Gabriele* v. *Chrysler Corp.*, 573 F. 2d 949, (6th Cir. 1978); *Simpson* v. *Whirlpool Corp.*, 573 F. 2d 957 (6th Cir. 1978); *Holliday* v. *Ketchum, MacLeod & Grove, Inc.*, ... F. 2d ....., No. 77-140 (3rd Cir. July 14, 1978). However, the Courts of Appeal for the Second and Ninth Circuits have rendered decisions which are diametrically opposed to the view expressed by the court below. *See Reich* v. *Dow Badische Co.*, ... F. 2d ....., 17 FEP Cases 363 (2d Cir. April 14, 1978); *Curry* v. *Continental Airlines*, 513 F. 2d 691 (9th Cir. 1975).

In *Reich*, the Court of Appeals for the Second Circuit reasoned as follows:

> "Much of Appellant's argument mistakenly proceeds on the tacit premise that resort to the state remedy is a technical step devoid of substantive content, and that, therefore, the slightest showing will warrant setting the bar of Section 633 (b) aside. That ignores the paramount circumstances, that the state remedy, or rather remedies, presented appellant with a full and adequate system of relief, and that there was no reason for turning to the federal remedy that did not equally direct the appellant to the state remedies, and that the scheme of the ADEA very explicitly requires that the grievant timely present his claim to the state authority before suing." ..... F.2d at ....., 17 FEP Cases at 367-368.

And, in *Curry*, the Court of Appeals for the Ninth Circuit reached this conclusion:

> "[W]e concur in the reasoning of those courts that have held decisions interpreting 42 U.S.C. § 2000e-5(b) [as amended 42 U.S.C. § 2000e-5(c)] . . . to be generally applicable for purposes of interpreting § 633(b). [Citation omitted.] 'The minor differences between § 633 and its counterpart under the 1964 Act are insignificant and provide no support for an interpretation of the former which is contrary to' interpretations of the latter. *Goger., supra,* at 16." 513 F.2d at 693 [Footnote omitted.]

The current confusion existing among the various circuits concerning this issue is further evidenced by the conflicting decisions of the Eighth Circuit. The Court's decisions of April 5, 1978 and July 6, 1978 are directly contrary to one another and both were rendered by divided panels. Indeed, even Judge Henley's opinion of July 6, 1978 noted that "the authorities are in conflict and the question is not free from doubt." (App. A18-A19.)

Congress drafted the ADEA in a manner designed to resolve age discrimination claims in the most expeditious fashion possible. *See* 113 Cong. Rec. 7076 (Remarks of Senator Javits). The courts have thus recognized that interpreting Section 14(b) as establishing a mandatory prerequisite to the commencement of a civil suit under the ADEA furthers this intent since the state agency will always be given a fixed, limited period of sixty days in which to resolve claims of age discrimination before the aggrieved individual can institute suit in federal court. *See Reich* v. *Dow Badische Co.,* ..... F. 2d ....., 17 FEP Cases 363, 367 (2d Cir. April 4, 1978) ("Deference to the state procedures where they exist is fundamental to the ADEA structure.") During this same sixty day period, the Secretary of Labor may also endeavor to settle the dispute since, under section 7(d) of the ADEA, 29 U. S. C. § 626(d), an individual must wait sixty days after filing his notice of intent to sue with the Secretary before instituting suit. *See Rogers* v. *Exxon Research Engineering Co.,* 550 F. 2d 834, 841, *cert. denied,* No. 76-1451, ... U. S. ....., 98 S. Ct. 749 (January 9, 1978) ("Private

lawsuits are secondary to administrative remedies and suits by the Secretary of Labor.").

By granting an aggrieved individual the "option" of initiating proceedings with the state agency or proceeding directly in federal court, the decision of the court below completely frustrates this intent. Instead of maximizing the possibility of resolving age discrimination claims during the sixty day period following the filing of a notice of intent to sue, the decision of the court below allows an individual to ignore available administrative avenues, remain idle during this sixty day period, and then resort immediately to the federal district courts.

The divergent conclusions which have been reached in the courts of appeals on this issue and the avowed uncertainty expressed by the Court of Appeals for the Eighth Circuit on rehearing is perhaps the best evidence that the issue is one which must be resolved by the Supreme Court. A uniform interpretation of the procedural requirements of the ADEA is required not just to protect the rights of employers seeking to comply with the statute, but to protect the rights of aggrieved individuals as well.

II. The Decision of the Eighth Circuit Court of Appeals Is Contrary to the Plain Language of Section 14(b) of the ADEA.

The decision of the court below contravenes the clear language of Section 14(b) which provides as follows:

> "In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in Employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, *no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. . . ."* (Emphasis added.)

The State of Iowa has a law prohibiting age discrimination in employment and has established the Iowa State Civil Rights Commission to grant or seek relief for such discriminatory practices. Section 601 A.5, 6, Code of Iowa (1975). Further, respondent concedes that he never made any resort to the Iowa Commission for relief.

On rehearing, the court below held that *"an individual has the option* of proceeding first before the state agency and then in the federal court or of proceeding initially in the federal court without prior resort to the state agency" (Emphasis added; App. A19). This, we submit, is completely inconsistent with the plain language of section 14(b) which provides that *"no suit may be brought before the expiration of sixty days after proceedings have been commenced under the State law."** (Emphasis added.)

Section 14(b) is couched in language almost identical to that appearing in Section 706(b) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5(c), which provides as follows:

> "In the case of an alleged unlawful employment practice occurring in a State, . . . which has a . . . law prohibiting the unlawful employment practice alleged and establishing or authorizing a State . . . authority to grant or seek relief from such practice . . . , *no charge may be filed . . . by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State . . . law unless such proceedings have been earlier terminated. . . .*" (Emphasis added.)

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* Section 14(b) is phrased in similar language to section 7(d) of the ADEA, 29 U. S. C. § 626(d), which provides that "[n]o civil action may be commenced . . . until" an aggrieved individual has satisfied certain prerequisites with respect to the filing of a notice of intent to sue with the Secretary of Labor. This language of section 7(d) has consistently been construed as setting forth a mandatory prerequisite to a civil suit under the ADEA. *See, e.g., Hiscott* v. *General Electric Co.*, 521 F. 2d 632 (6th Cir. 1975); *Powell* v. *Southwestern Bell Telephone Co.*, 494 F. 2d 485 (5th Cir. 1974).

It has uniformly been held that this section requires prior resort to the appropriate state agencies before suit may be brought under Title VII in the federal district courts. *See Love* v. *Pullman Co.*, 404 U. S. 522 (1972); *Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228 (8th Cir. 1975); *Local 5, Electrical Workers* v. *EEOC*, 398 F. 2d 248 (3rd Cir.), *cert. denied*, 393 U. S. 1021 (1968). And, it is because of this similarity in language that the majority of federal courts, faced with the question of interpreting section 14(b), have looked to Title VII for guidance and have thus concluded, contrary to the court below, that this provision sets forth a mandatory prerequisite to a civil suit under the ADEA. *E.g., Reich* v. *Dow Badische Co.*, ... F. 2d ....., 17 FEP Cases 363 (2d Cir. April 4, 1978); *Curry* v. *Continental Airlines*, 513 F. 2d 691 (9th Cir. 1975); *Enos* v. *Kaiser Industries Corp.*, 443 F. Supp. 798 (D. D. C. 1978); *Fitzgerald* v. *New England Telephone Co.*, 437 F. Supp. 635 (1976), *modified*, 437 F. Supp. 635 (D. Mass. 1977); *Bertsch* v. *Ford Motor Co.*, 415 F. Supp. 619 (E. D. Mich. 1976); *Berry* v. *Crocker Nat'l Bank*, 13 FEP Cases 673 (N. D. Cal. 1976); *Acford* v. *Exxon Corp.*, 12 FEP Cases 1500 (D. Conn. 1975); *Arnold* v. *Hawaiian Telephone Co.*, 407 F. Supp. 903 (D. Hawaii 1975); *McGinley* v. *Burroughs Corp.*, 407 F. Supp. 903 (E. D. Penn. 1975); *Smith* v. *Crest Communities, Inc.*, 8 FEP Cases 1328 (W. D. Ky. 1974).

Further, the identity of language between Title VII, which was passed in 1964, and the ADEA, which was passed in 1967, coupled with the fact that both statutes have the same general purpose of remedying employment discrimination, makes the doctrine of *in pari materia* applicable. Under this doctrine, where there is some uncertainty as to the proper interpretation of a later statutory provision, the settled rule of statutory construction is to apply that later statutory provision in the same manner as the former. *See Northcross* v. *Board of Education of the Memphis City Schools*, 412 U. S. 427, 428 (1973). Applying that principle here, Section 14(b) should be interpreted in

the same manner as Section 706(b). The decision of the court below ignores this well-established principle.

It is thus clear that the Eighth Circuit erred in holding that Section 14(b) does not set forth a statutory prerequisite to a civil suit under the ADEA. The plain language of the statute, its similarity to Section 706(b) of Title VII, and well-established rules of statutory construction, compel the conclusion that the original opinion issued by the Court of Appeals for the Eighth Circuit was the one that correctly expresses congressional intent.

CONCLUSION.

For all of the foregoing reasons, we respectfully request that a writ of certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Eighth Circuit in this case.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
Southern District of Iowa
Davenport Division

JOSEPH W. EVANS, *Plaintiff,*
vs.
OSCAR MAYER & Co., et al., *Defendants.*
Civil No. 77-19-D

ORDER.

The matter currently before the Court concerns defendant's resisted motion to dismiss for lack of subject matter jurisdiction. The original complaint was filed March 7, 1977 alleging that plaintiff had been forced into early retirement under threat of termination by defendants in violation of the Age Discrimination in Employment Act (ADEA), 29 U. S. C. §§ 621 et seq. Violations of 42 U. S. C. § 2000e were also alleged. Jurisdiction is predicated upon 28 U. S. C. §§ 1331 and 1343.

Plaintiff further alleges that by letter dated March 10, 1976, subsequent to his retirement on or about January 31, 1976, "Notice of Intent to Sue" was served on the Secretary of Labor in accordance with the statutory requirements. On April 13, 1977 defendants filed the instant motion to dismiss alleging that a "procedural prerequisite requires the grievant to seek the aid of the appropriate state authority if such an agency has been established to provide relief from alleged age discrimination".

In his resistance, filed April 25, 1977, plaintiff narrows the issue thus presented stating:

> The sole issue before the Court is, then, whether ADEA requires, as a jurisdictional prerequisite, the institution of proceedings before the Iowa Civil Rights Commission prior to the initiation of a United States District Court litigation. Plaintiff asserts that it does not.

Simply stated, plaintiff concedes that no resort has been attempted to the Iowa Commission on Civil Rights. Defendant asserts that such resort is a jurisdictional prerequisite and that the failure to do so is a jurisdictional bar to subsequent litigation in federal court.

Initially the Court notes that many of the cases relied upon by both parties appear to be inapposite. Those cases dealing with the statutory requirement of filing "notice of intent to sue" with the Secertary of Labor differ because of the language of the two statutory provisions. Section 626(d) provides that "[s]uch notice *shall* be filed * * *". This is clearly a mandatory provision and it has been so held by a number of courts considering the issue. See *Woodburn* v. *LTV Aerospace Corp.*, 531 F. 2d 750 (5th Cir., 1976); *Rucker* v. *Great Scott Supermarkets*, 528 F. 2d 393 (6th Cir., 1976); *Hiscott* v. *General Electric Co.*, 521 F. 2d 632 (6th Cir., 1975); *Law* v. *United Airlines Inc.*, 519 F. 2d 170, 171 (10th Cir., 1975); *Edwards* v. *Kaiser Aluminum & Chemical Sales, Inc.*, 515 F. 2d 1195 (5th Cir., 1975); *Powell* v. *Southwestern Bell Telephone Co.*, 494 F. 2d 485 (5th Cir., 1974). Cf. *Hinton* v. *CPC International, Inc.*, 520 F. 2d 1312, 1315 (8th Cir., 1975).

Section 633(b), on the other hand, does not expressly command the commencement of proceedings under state law. It provides that "no suit may be brought under section 626 of this title before the expiration of sixty days *after proceedings have been commenced under* the State law". See *Bertrand* v. *Orkin Exterminating Co.*, 419 F. Supp. 1123, 1125-27 (N. D. Ill., 1976). This section is entirely consistent with the interpretation that only when resort has been made to a state agency is the sixty day waiting period mandatory. See *Vasquez* v. *Eastern Air-*

lines, Inc., 405 F. Supp. 1353 (D. Puerto Rico, 1975). It does not mandate initial filing with the state agency.

Secondly, those cases which draw a direct analogy to the procedures utilized under Title VII, 42 U. S. C. §§ 2000e et seq., are also not controlling. Pursuant to the authority of the EEOC and procedures followed thereunder, 29 C. F. R. §§ 1601 et seq., specific language mandates initial deference to specified state agencies. No such procedural requirements apply under the ADEA. In the latter, the statute provides:

> With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Secretary of Labor *may*, for the purpose of carrying out their respective functions and duties under this chapter utilize the services of State and local agencies and their employees * * *. (Emphasis added.)

See also 29 C. F. R. §§ 850 et seq. This lack of specific and mandatory deferral provisions seemingly would distinguish the Title VII rationale. See *Love* v. *Pullman*, 404 U. S. 522 (1972); *EEOC* v. *Union Bank*, 408 F. 2d 867 (9th Cir., 1968).

In addition Title VII legislation contains no counterpart to section 633(a) of the ADEA which provides "that upon commencement of action under this chapter such action shall supersede any State action". This section of the ADEA would seem to make mandatory filing with the state agency unnecessary and dilatory. It would, as was noted in *Bertrand, supra,*

> [imply] a belief that Congress would choose to defer to federalism by burdening victims of age discrimination with an obligation to file what will ordinarily be nothing more than a *pro forma* gesture. Mandatory recourse to state remedies, which need not be exhausted, would normally be a dilatory exercise or a 'procedural pitfall for unsuspecting individuals'.

Bertrand v. *Orkin Exterminating Co., supra* at 1127 *quoting Vazquez* v. *Eastern Airlines, Inc., supra* at 1357. Such a con-

struction is supported also by Judge Garth in his concurring opinion in *Goger* v. *H. K. Porter Co.*, 492 F. 2d 13 (3d Cir., 1974), in which it was stated:

> I do not believe that it was the intent of Congress to require, prior to the institution of a Federal action, the commencement of a State proceeding which, under § 633 (b), need not be concluded and which in any event would be superseded by the filing of the Federal action under § 633(a).

Goger v. *H. K. Porter Co., supra* at 18. See also *Magalotti* v. *Ford Motor Co.*, 418 F. Supp. 430, 433 (E. D. Mich., 1976). Finally, in *Goger, supra*, although stating that timely resort should be taken to state agencies, the court nonetheless vacated an order of dismissal entered by the district court because of equitable considerations. Had the court considered section 633(b) to be jurisdictional despite the existence of section 633 (a) it would have lacked the power to grant equitable relief. See *Magalotti* v. *Ford Motor Co., supra* at 432.

This Court adopts the rationale of those cases which have held that resort to the state agency is not a jurisdictional prerequisite to the filing of an action in Federal Court. *See Bertrand v. Orkin Exterminating Co., supra; Smith* v. *Joseph Schlitz Brewing Co.*, 419 F. Supp. 771 (D. N. J., 1976); *Magalotti* v. *Ford Motor Co., supra; Vazquez* v. *Eastern Airlines, Inc., supra; Skoglund* v. *Singer Co.*, 403 F. Supp. 797 (D. N. H., 1975).

It is apparent that in certain areas there exists a great deal of similarity between the ADEA and Title VII legislation. In particular section 7 of the ADEA, 29 U. S. C. §§ 626(c)-(e) and § 706(c) of the 1964 civil rights act 42 U. S. C. §§ 2000e-5(b)-(d) are both jurisdictional sections containing similar language, yet the ADEA "is embodied in a separate act and has its own unique history * * *". *Laugesen* v. *Anaconda Co.*, 510 F. 2d 307, 312 (6th Cir., 1975). This would indicate that automatic adoption of Title VII guidelines would be inappropriate. See

H. R. No. 805, 2 U. S. Code Cong. & Ad. News 2213 (1967). Section 7 thus does not make the filing of an administrative charge with the appropriate state agency a jurisdictional step. Its only requirement in the case of an age discrimination complaint is that the Secretary of Labor be afforded timely notice of intent to file suit in federal court. The purpose of such filing is to enable the Secretary to attempt to eliminate the alleged violation through the informal methods of conciliation, conference and persuasion as expeditiously as possible.

In contrast, section 14 of the ADEA, 29 U. S. C. § 633 providing for deferral by the Secretary in cases in which a complaint has been filed with the appropriate state agency is not a jurisdictional section and sets forth no jurisdictional steps for instituting suit in federal court. This section deals solely with the relationship between federal and state law. This is clear from the very heading of the section which is entitled "Federal-State relationship" and is captioned Limitation of Federal action upon commencement of State proceedings. It is this Court's opinion that such section is a Congressional recognition of the sensitive relationship between federal and state governments. It affords states a reasonable opportunity to settle age discrimination problems before federal action if a party has resorted to a state complaint. There is however, no indication that such filing is a compulsory prerequisite to federal jurisdiction.

Congress specifically rejected agency enforcement proceedings analogous to those utilized by the EEOC because of the inherent delay involved in such procedures. Compare S. 830 90th Cong. 1st Sess. (113 Cong. Rec. 2794-2796) to the final version of the Act. As Senator Javits noted:

> By utilizing the courts rather than [administrative agencies] as the forum to hear cases arising under the law, these delays may be largely avoided * * * [i]n the case of older citizens to whom by definition, relatively few productive years are left.

Statements by Senator Javits, Hearings Before the Subcommittee on Labor, United States Senate, 113 Cong. Rec. 7076, 90th Cong. 1st Sess. (1967). See *Bertrand* v. *Orkin Exterminating Co., supra; Vazquez* v. *Eastern Airlines, Inc., supra.*

There exists no dispute between the parties to this suit that the Iowa Commission on Civil Rights is properly an agency to which deferral could have been made in the first instance. However, this was not done and it is the specific holding of this Court that such resort is not a mandatory nor jurisdictional prerequisite to the filing of an ADEA suit in federal court. This interpretation is consistent with the Eighth Circuit directive that "[t]he Age Discrimination Act is remedial and humanitarian legislation. It is to be construed liberally to achieve its purpose of protecting older employees from discrimination * * *. A procedural requirement of the Act, of doubtful meaning in a given case, should not be interpreted to deny an employee a claim for relief unless to do so would clearly further some substantial goal of the Act". See *Moses* v. *Falstaff Brewing Corp.*, 525 F. 2d 92, 92-94 (8th Cir., 1975).

With regard to plaintiff's claim pursuant to Title VII, however, the motion to dismiss must be granted. Plaintiff has not resisted the motion to dismiss on this ground. Further, as defendant correctly points out, Title VII has no application in age discrimination cases and plaintiff has totally failed to allege compliance with the statutory prerequisites to the initiation of such an action in Federal Court pursuant to Title VII. See *Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228 (8th Cir., 1975).

IT IS THEREFORE ORDERED that defendant's motion to dismiss with regard to plaintiff's cause of action premised on 42 U. S. C. §§ 2000e et seq., shall be, and the same are hereby granted.

IT IS FURTHER ORDERED that defendant's motion to dismiss the cause of action pursuant to the Age Discrimination

in Employment Act, 29 U. S. C. §§ 621 et seq., shall be, and the same is hereby denied.

Signed this 8th day of July, 1977.

/s/ W. C. STUART,
W. C. Stuart,
U. S. District Judge, Southern District of Iowa.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 77-1692

JOSEPH W. EVANS, *Appellee,*

vs.

OSCAR MAYER & CO., ROBERT M. BOLZ, N. D. OTTENS, DONALD L. PAUL, and PAUL F. GOULD, *Appellants.*

Appeal from the United States District Court for the Southern District of Iowa.

Submitted: January 12, 1978
Filed: April 5, 1978

Before BRIGHT and HENLEY, *Circuit Judges,* and TALBOT SMITH, *Senior District Judge.**

BRIGHT, *Circuit Judge.*

Joseph Evans brought this suit against his employer, Oscar Mayer & Company, and its executives,[1] charging that they forced Evans into early retirement in violation of the Age Discrimination in Employment Act (ADEA), 29 U. S. C. §§ 621-634 (1970). Oscar Mayer moved to dismiss the action for want of jurisdiction. The district court denied the motion and certified this interlocutory ruling for appeal under 28 U. S. C.

1. In this opinion we shall refer to the defendants collectively as "Oscar Mayer."

TALBOT SMITH, *United States Senior District Judge,* District of Michigan, sitting by designation.

§ 1292(b) (1970), stating that the order presented "a controlling question of law as to which there is substantial ground for difference of opinion" and "that an immediate appeal * * * may materially advance the ultimate outcome of the litigation." This court thereafter permitted this appeal. We vacate the district court's order and remand for further proceedings.

Joseph Evans worked for Oscar Mayer & Co. in Davenport, Iowa, for twenty-three years before his retirement on January 31, 1976. On March 10, 1976, Evans notified the Secretary of Labor, as required by 29 U. S. C. § 626(d),[2] that he intended to sue Oscar Mayer under the ADEA. He filed the present action in federal district court on May 7, 1977. Thereafter, Oscar Mayer moved to dismiss the action for lack of subject matter jurisdiction, arguing that Evans had not fulfilled a jurisdictional requirement under 29 U. S. C. § 633(b) because he did not first file charges with the Iowa Civil Rights Commission. The district court concluded that filing charges with an appropriate state agency is not a jurisdictional prerequisite to an action in federal court. It therefore denied the motion, and Oscar Mayer appealed.

2. Section 626(d) provides:

> No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Section 633(b) of the ADEA reads as follows:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, *no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law*, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority. [Emphasis added.]

Iowa has a law prohibiting age discrimination in employment,[3] and the Iowa Civil Rights Commission has the authority to seek relief from such practices. The narrow issue raised on appeal is whether filing a claim with the state agency is a prerequisite to a suit under the ADEA.

A definitive answer cannot be found in either the language of the statute, its legislative history, or the policy behind it. The extensive discussions found in *Vazquez* v. *Eastern Airlines, Inc.*, 405 F. Supp. 1353 (D. P. R. 1975) (filing with state agency not required), and *Bertsch* v. *Ford Motor Co.*, 415 F. Supp. 619 (E. D. Mich. 1976) (filing with state agency is required), demonstrate that substantial support can be found for either conclusion. Several courts have determined that deference to an appropriate state agency is required by the ADEA, *see Curry* v. *Continental Airlines*, 513 F. 2d 691 (9th Cir. 1975); *Goger* v. *H. K. Porter Co.*, 492 F. 2d 13 (3d Cir. 1974); *Gabriele* v. *Chrysler Corp.*, 416 F. Supp. 666 (E. D. Mich. 1976); *Fitzgerald* v. *New England Telephone and Telegraph Co.*, 416 F. Supp. 617 (D. Mass. 1976), *modified*, 437 F. Supp. 635 (1977); *Berry* v. *Crocker National Bank*, 13 FEP Cases 673 (N. D. Cal. 1976), while other courts have held it to be optional, *see Bertrand* v. *Orkin Exterminating Co.*, 419 F. Supp. 1123 (N. D. Ill. 1976); *Smith* v. *Jos. Schlitz Brewing Co.*, 419 F. Supp. 770 (D. N. J. 1976); *Magalotti* v. *Ford Motor Co.*, 418 F. Supp. 430 (E. D. Mich. 1976); *Skoglund* v. *Singer Co.*, 403 F. Supp. 797 (D. N. H. 1975).

3. Iowa Code Ann. § 601A.6 (1975).

We conclude that, in a state having laws that prohibit age discrimination and having an agency with authority to seek relief from such practices, filing a charge with the state agency is mandatory under the ADEA and is a prerequisite to the filing of an action in federal court.

Congress clearly intended that discrimination on the basis of age be remedied as quickly and efficiently as possible, for lengthy delays in the courts and administrative agencies could deprive older workers of an effective remedy. Section 626(d) of the ADEA expressly requires the claimant to notify the Secretary of Labor before filing suit and requires the Secretary to "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." Although Congress patterned much of the ADEA after Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000e-2000e-17 (1970), and other labor statutes, it rejected a proposed enforcement procedure that would have subjected ADEA complaints to the same delays that plague the EEOC and NLRB. *Vazquez* v. *Eastern Air Lines, Inc., supra*, 405 F. Supp. at 1354-55. Instead, the claimant need defer to the Secretary of Labor and the state agency for only sixty days before bringing suit. Thus, in those cases in which the Secretary of Labor or the state agency is able to provide speedy relief, the claimant can escape the delay inherent in any federal court action. On the other hand, if prompt relief cannot be obtained, the claimant may bring an action after waiting only sixty days. Requiring a claimant to seek relief

through a state agency designed specifically to handle this type of case is consistent with congressional intent. It increases the chances of conciliation while creating no additional delay, for the sixty-day period of deference to the state agency may run concurrently with the sixty-day period of deference to the Secretary of Labor. *Bertsch* v. *Ford Motor Co., supra,* 415 F. Supp. at 623.

Moreover, the pertinent language of section 633(b) is nearly identical to language in Title VII:

> In the case of an alleged unlawful employment practice occurring in a State * * * which has a * * * law prohibiting the unlawful employment practice alleged and establishing or authorizing a State * * * authority to grant or seek relief from such practice * * *, no charge may be filed * * * by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State * * * law, unless such proceedings have been earlier terminated * * *. [42 U. S. C. § 2000e-5(b) (1970).]

This language of Title VII requires that state agencies be afforded an opportunity to consider the employment discrimination before suit for redress may be brought in a federal court. *See Love* v. *Pullman Co.,* 404 U. S. 522 (1972); *Olson* v. *Rembrandt Printing Co.,* 511 F. 2d 1228 (8th Cir. 1975).

The requirement that a charge be filed with an appropriate state agency is not, however, "jurisdictional;" it is a procedural requirement, which may be subject to equitable modification when necessary to effect the broad remedial purposes of the statute. A similar principle has been applied in interpreting various procedural requirements under Title VII, *see Lacy* v. *Chrysler Corp.,* 533 F. 2d 353 (8th Cir., *cert. denied,* 429 U. S. 959 (1976); *Tuft* v. *McDonnell Douglas Corp.,* 517 F. 2d 1301 (8th Cir. 1975), *cert. denied,* 423 U. S. 1052 (1976); *Reeb* v. *Economic Opportunity Atlanta, Inc.,* 516 F. 2d 924 (5th Cir. 1975); *Franks* v. *Bowman Transportation Co.,* 495

F. 2d 398 (5th Cir. 1974), *rev'd on other grounds,* 424 U. S. 747 (1976), and we feel it should apply to the present case.

The question remains, therefore, whether Evans should be allowed, on equitable grounds, to proceed with his action despite his failure to file a complaint with the Iowa Civil Rights Commission.[4] In his resistance to Oscar Mayer's motion to dismiss, Evans argued that he had relied on official advice from the Department of Labor that the only requirement under the ADEA was notice to the Secretary of Labor. Moreover, Evans had no interpretation of section 633(b) by this court to guide him. *See Goger* v. *H. K. Porter Co., supra,* 492 F. 2d at 16-17. The district court did not reach this question in disposing of Oscar Mayer's motion. We therefore vacate the district court's order and remand for further proceedings, consistent with this opinion, on the pending motion for dismissal.

HENLEY, *Circuit Judge,* dissenting.

While the majority says that the "requirement" of § 633(b) that Mr. Evans file a complaint with the Iowa Civil Rights Commission before commencing his federal suit under the provisions of § 626(c) is not "jurisdictional", still the majority holds that prior filing with the state agency was a procedural requirement, and that noncompliance with the requirement may be excused only on the basis of equitable considerations which may or may not be present in a particular case.

I respectfully disagree. I think that it is correct to say that if an individual complaining about alleged discrimination against him in employment on account of his age in fact files a complaint with a state fair employment practice agency like the Iowa Civil Rights Commission, he must observe the waiting period prescribed by § 633(b). However, I am not persuaded that an individual is required to file a complaint with the state

4. Iowa Code Ann. § 601A.14(15) (1975) requires that a complaint be filed within 120 days after the discriminatory practice occurred. This period has run. Therefore, Evans apparently no longer can comply with the state agency filing requirement.

agency before coming into federal court, assuming that he complies with the basic waiting period prescribed by § 626(d). I think that the individual has the option of proceeding first before the state agency and then in the federal court or of proceeding initially in the federal court without prior resort to the state agency.

The majority and I both recognize that the cases are in conflict. I prefer the view set out by Judge Garth in his concurring opinion in *Goger* v. *H. K. Porter Co.*, 492 F. 2d 13, 17-18 (3d Cir. 1974), and for that reason I dissent. I would affirm the action of the district court.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS.
for the Eighth Circuit.

No. 77-1692

JOSEPH W. EVANS,
Appellee,

vs.

OSCAR MAYER & CO., ROBERT M. BOLZ, N. D. OTTENS, DONALD L. PAUL, and PAUL F. GOULD,
Appellants.

Appeal from the United States District Court for the Southern District of Iowa.

OPINION ON REHEARING.

Before BRIGHT and HENLEY, *Circuit Judges*, and TALBOT SMITH, *Senior District Judge.**

HENLEY, *Circuit Judge.*

Joseph W. Evans brought this suit against his employer, Oscar Mayer & Co., and its executives,[1] charging that they had forced him into early retirement in violation of the Age Discrimination in Employment Act (ADEA), 29 U. S. C. §§ 621-634 (1970). Oscar Mayer moved to dismiss the action

* TALBOT SMITH, *United States Senior District Judge,* Eastern District of Michigan, sitting by designation.

1. In this opinion we shall refer to the defendants collectively as "Oscar Mayer."

for want of jurisdiction. The district court denied the motion and certified this interlocutory ruling for appeal under 28 U. S. C. § 1292(b) (1970), stating that the order presented a "controlling question of law as to which there is substantial ground for difference of opinion" and "that an immediate appeal . . . may materially advance the ultimate outcome of the litigation." This court thereafter permitted this appeal.

The case was argued and submitted on January 12, 1978, and was decided on April 5 of this year. A majority of the court voted to vacate the order of the district court and to remand the case for further proceedings. Thereafter, the plaintiff-appellee filed a petition for rehearing and suggestions for rehearing en banc. Plaintiff was supported in his position by the Secretary of Labor who is charged with the duty of enforcing ADEA but who was not a party to the original action. The Secretary was permitted to file an amicus curiae brief taking the position that the district court had jurisdiction of the case, and that the original determination of the district court was correct.

In his brief the Secretary pointed out that two days after our original decision was announced, the Court of Appeals for the Sixth Circuit had reached an opposite result in *Gabriele* v. *Chrysler Corp.*, ... F. 2d ..... (6th Cir. No. 76-2265 April 7, 1978), and that that court had adhered to *Gabriele* in an order entered on April 10, 1978 in *Simpson* v. *Whirlpool Corp.*, ... F. 2d ..... (6th Cir. No. 76-2195 April 10, 1978).

We have given careful consideration to the matter. We grant rehearing, withdraw our original opinion and substitute this one in its stead. This time, we affirm the order of the district court.

Joseph Evans worked for Oscar Mayer & Co. in Davenport, Iowa for twenty-three years before his retirement on January 31, 1976. On March 10, 1976 Evans notified the Secretary of Labor, as required by 29 U. S. C. § 626(d),[2] that he intended

2. Section 626(d) provides:

> No civil action may be commenced by any individual under this section until the individual has given the Secretary not less

(Footnote continued on next page.)

to sue Oscar Mayer under the ADEA. He filed the present action in federal district court on May 7, 1977. Thereafter Oscar Mayer moved to dismiss the action for lack of subject matter jurisdiction, arguing that Evans had not fulfilled a jurisdictional requirement under 29 U. S. C. § 633(b) because he did not first file charges with the Iowa Civil Rights Commission. The district court concluded that filing charges with an appropriate state agency is not a jurisdictional prerequisite to an action in federal court. It therefore denied the motion, and Oscar Mayer appealed.

Section 633(b) of the ADEA reads as follows:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, *no suit may be brought under Section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law,* unless such proceedings have been earlier terminated: *Provided,* that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based the proceeding shall be deemed to have been com-

(Footnote continued from preceding page.)

> than sixty days' notice of an intent to file such action. Such notice shall be filed—
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> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
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> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

menced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority. [Emphasis added.]

Iowa has a law prohibiting age discrimination in employment,[3] and the Iowa Civil Rights Commission has the authority to seek relief from such practices. The narrow issue raised on appeal is whether filing a claim with the state agency is a prerequisite to a suit under the ADEA.

A definitive answer cannot be found in either the language of the statute, its legislative history, or the policy behind it. The extensive discussions found in *Vazquez* v. *Eastern Air Lines, Inc.*, 405 F. Supp. 1353 (D. P. R. 1975) (filing with state agency not required), and *Bertsch* v. *Ford Motor Co.*, 415 F. Supp. 619 (E. D. Mich. 1976) (filing with state agency is required), demonstrate that substantial support can be found for either conclusion. Several courts have determined that deference to an appropriate state agency is required by the ADEA, *see Reich* v. *Dow Badische Co.*, ... F. 2d ....., 17 FEP Cases 363 (2d Cir. No. 76-7637, April 4, 1978), including the dissenting opinion of Judge Feinberg; *Curry* v. *Continental Airlines*, 513 F. 2d 691 (9th Cir. 1975); *Goger* v. *H. K. Porter Co.*, 492 F. 2d 13 (3d Cir. 1974); *Gabriele* v. *Chrysler Corp.*, 416 F. Supp. 666 (E. D. Mich. 1976), *rev'd*, ... F. 2d ..... (6th Cir. 1978), *supra; Fitzgerald* v. *New England Telephone & Telegraph Co.*, 416 F. Supp. 617 (D. Mass. 1976), *modified*, 437 F. Supp. 633 (1977); *Berry* v. *Crocker Nat'l Bank*, 13 FEP Cases 673 (N. D. Cal. 1976), while other courts have held it to be optional, *see Bertrand* v. *Orkin Exterminating Co.*, 419 F. Supp. 1123 (N. D. Ill. 1976); *Smith* v. *Jos. Schlitz Brewing Co.*, 419 F. Supp. 770 (D. N. J. 1976); *Magalotti* v. *Ford Motor Co.*, 418 F. Supp. 430 (E. D. Mich. 1976); *Skoglund* v. *Singer Co.*, 403 F. Supp. 797 (D. N. H. 1975).

While it is obvious that the authorities are in conflict, and the question is not free from doubt, we think that the preferable

3. Iowa Code Ann. § 601A.6 (1975).

view is that taken by the Court of Appeals for the Sixth Circuit in *Gabriele, supra,* and which is also expressed in the concurring opinion of Judge Garth in *Goger* v. *H. K. Porter Co., supra,* 492 F. 2d at 17-18. We now hold that if an individual complaining about alleged discrimination against him in employment on account of his age in fact files a complaint with a state fair employment practice agency like the Iowa Civil Rights Commission, he must observe the waiting period prescribed by § 633(b). We do not think, however, that an individual is required to file a complaint with the state agency before coming into federal court, assuming that he complies with the basic waiting period prescribed by § 626(d). In our opinion such an individual has the option of proceeding first before the state agency and then in the federal court or of proceeding initially in the federal court without prior resort to the state agency.

The views here expressed are in accord with the interpretation that the Secretary places on § 633(b), and it goes without saying that his interpretation of the Act is entitled to great weight. *See, e.g., Van Wyk* v. *Bergland, Secretary of Agriculture,* 570 F. 2d 701, 704 (8th Cir. 1978), and cases cited.

Affirmed.

BRIGHT, *Circuit Judge,* dissenting.

I respectfully dissent.

In my judgment, in a state such as Iowa, which has laws prohibiting age discrimination and an agency with authority to seek relief from such practice, filing a charge with the state agency is mandatory under the ADEA and is a prerequisite to the filing of an action in federal court, subject, however, to certain considerations. *See Reich* v. *Dow Badische Co.*, 17 FEP Cases 363, 368 (2d Cir. 1978); *Goger* v. *H. K. Porter Co.*, 492 F. 2d 13, 16 (3d Cir. 1974).

Congress clearly intended that discrimination on the basis of age be remedied as quickly and efficiently as possible, for lengthy delays in the courts and administrative agencies could

deprive older workers of an effective remedy. Section 626(d) of the ADEA expressly requires the claimant to notify the Secretary of Labor before filing suit and requires the Secretary to "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." Although Congress patterned much of the ADEA after Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000e-2000e-17 (1970), and other labor statutes, it rejected a proposed enforcement procedure that would have subjected ADEA complaints to the same delays that plague the EEOC and NLRB. *Vazquez* v. *Eastern Air Lines, Inc., supra,* 405 F. Supp. at 1354-55. Instead, the claimant need defer to the Secretary of Labor and the state agency for only sixty days before bringing suit. Thus, in those cases in which the Secretary of Labor or the state agency is able to provide speedy relief, the claimant can escape the delay inherent in any federal court action. On the other hand, if prompt relief cannot be obtained, the claimant may bring an action after waiting only sixty days. Requiring a claimant to seek relief through a state agency designed specifically to handle this type of case is consistent with congressional intent. It increases the chances of conciliation while creating no additional delay, for the sixty-day period of deference to the state agency may run concurrently with the sixty-day period of deference to the Secretary of Labor. *Bertsch* v. *Ford Motor Co., supra,* 415 F. Supp. at 623.

Moreover, the pertinent language of section 633(b) is nearly identical to language in Title VII:

> In the case of an alleged unlawful employment practice occurring in a State * * * which has a * * * law prohibiting the unlawful employment practice alleged and establishing or authorizing a State * * * authority to grant or seek relief from such practice * * *, no charge may be filed * * * by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State * * * law, unless such proceedings have been earlier terminated * * *. [42 U. S. C. § 2000e-5(b) (1970) (currently at § 2000e-5(c)).]

This language of Title VII requires that state agencies be afforded an opportunity to consider the employment discrimination before suit for redress may be brought in a federal court. *See Love* v. *Pullman Co.,* 404 U. S. 522 (1972); *Olson* v. *Rembrandt Printing Co.,* 511 F. 2d 1228 (8th Cir. 1975).

In the present cases, however, I would not dismiss the action outright, even though Evans failed to file a charge with the state agency. That requirement is not "jurisdictional"; it is a procedural requirement, which may be subject to equitable modification when necessary to effect the broad remedial purposes of the statute. A similar principle has been applied in interpreting various procedural requirements under Title VII, *see Lacy* v. *Chrysler Corp.,* 533 F. 2d 353 (8th Cir.), *cert. denied,* 429 U. S. 959 (1976); *Tuft* v. *McDonnell Douglas Corp.,* 517 F. 2d 1301 (8th Cir. 1975), *cert. denied,* 423 U. S. 1052 (1976); *Reeb* v. *Economic Opportunity Atlanta, Inc.,* 516 F. 2d 924 (5th Cir. 1975); *Franks* v. *Bowman Transportation Co.,* 495 F. 2d 398 (5th Cir. 1974), *rev'd on other grounds,* 424 U. S. 747 (1976), and I feel it should apply to the present case.

In his resistance to Oscar Mayer's motion to dismiss, Evans argued that he had relied on official advice from the Department of Labor that the only requirement under the ADEA was notice to the Secretary of Labor. Moreover, Evans had no interpretation of section 633(b) by this court to guide him. *See Goger* v. *H. K. Porter Co.,* 492 F. 2d 13, 16-17 (3d Cir. 1974). The district court did not reach this question in disposing of Oscar Mayer's motion. I would, therefore, vacate the district court's order and remand for further proceedings on the motion to dismiss.

July 6, 1978

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 77-1692. September Term, 1977

JOSEPH W. EVANS,
Appellee,

vs.

OSCAR MAYER & Co., et al,
Appellants.

Appeal from the United States District Court for the Southern District of Iowa.

Petition for rehearing en banc filed by counsel for appellee is denied.

Judges Bright and Ross would vote for petition for rehearing en banc essentially for the reasons set forth in Judge Bright's dissent to the opinion filed July 6, 1978.

July 7, 1978

APPENDIX B.

Statutes Involved.

Section 14(b) of the Age Discrimination in Employment Act, 29 U. S. C. § 633(b), reads as follows:

> "(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority, other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority."

Section 7(d) of the Age Discrimination in Employment Act, 29 U. S. C. § 626(d), reads as follows:

> "(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> "(1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> "(2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

"Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion."

Section 706(b) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5(c), reads as follows:

"(c) In the case of an alleged unlawful employment practice occuring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purpose of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority."

Supreme Court, U. S.
FILED
DEC 14 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-275

OSCAR MAYER & CO., ET AL.,

Petitioners,

vs.

JOSEPH W. EVANS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 18, 1978
CERTIORARI GRANTED JULY 3, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-275

OSCAR MAYER & CO., ET AL.,

Petitioners,

vs.

JOSEPH W. EVANS,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Order of District Court, July 8, 1977.....Cert. Pet. App. A1

Opinion, Court of Appeals, April 5, 1978...Cert. Pet. App. A8

Opinion on Rehearing, Court of Appeals, July 6, 1978.... .....Cert. Pet. App. A15

Order Denying Petition for Rehearing en banc, Court of Appeals, July 7, 1978.....Cert. Pet. App. A22

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES.

In the United States District Court for the Southern District of Iowa, Davenport Division

Date	Nr.	Proceedings
5– 7–77	(1)	Complaint.
		Issued summons and delivered to U. S. Marshal.
4– 4–77	(2)	Appearance on behalf of Dfdnts.
3–31–77	(3)	Summons w/Marshal's Return:
		Oscar Mayer & Co. served through L. D. Sheldahl, VP, at Madison, Wisconsin on 3-14-77. Fee: $5.44
		N. D. Ottens served on 3-14-77. Fee $4.00 Robert Bolz served on 3-28-77. Fee: $4.52
		Donald Paul served on 3-16-77 at Davenport, Ia. Fee: $4.44./s/ Schindler, DUSM.
4–13–77	(4)	Motion of Dfdnts to Dismiss for Lack of Jurisdiction.
4–13–77	(5)	Memorandum in Support of Motion of Dfdnts to Dismiss for Lack of Jurisdiction.
4–25–77	(6)	Pltf's Resistance to Motion of Dfdnts to Dismiss for Lack of Jurisdiction.
5– 3–77	(7)	Dfdnts' Rply to Pltf's Memorandum in Resistance to Dfdnts' Motion to Dismiss.
7– 8–77	(8)	Order that dfdnt's motion to dismiss w/regard to pltf's cause for action premised on 42 USC §§ 2000e et seq, shall be, and the same is hereby granted Further Ordered that

defendant's motion to dismiss the cause of action pursuant to Age Discrimination in Employment Act 29 USC S. 621 et seq, shall be, and the same is hereby denied /s/ Stuart, J. (copies to attys & J)

7–25–77 (9) Dfdnt's Motion for Certification of Order of July 8, 1977.

8– 8–77(10) Order that defendants motion for certification for immediate appeal to the Court of Appeals for the Eighth Circuit shall be, and the same is hereby granted /s/ Stuart, J. (copy to attys)

UNITED STATES DISTRICT COURT.

* * (Caption—77-19-D) * *

COMPLAINT.

1. The jurisdiction of the Court is invoked pursuant to 28 U. S. C. 1331 and 1343. This action arises under the provisions of 29 U. S. C. 623, et seq., 43 U. S. C. 2000e, et seq., and Plaintiff invokes the provisions thereof. The amount in controversy exceeds Ten Thousand Dollars ($10,000.00) exclusive of interest and costs.

PARTIES.

2. Plaintiff Joseph W. Evans is an individual residing in Williamsburg, Iowa and until retirement from Oscar Mayer & Co., effective January 31, 1976, was employed by the said Oscar Mayer & Co. as a hog buyer.

3. The Defendant Oscar Mayer & Co. is a corporation incorporated under the laws of the State of Delaware and are licensed to do business in Iowa with their resident agent being CT Corporation System, 1010 Savings & Loan Building, Des Moines, Iowa 50309.

4. The Defendant Robert M. Bolz, is President and chief executive officer of the Defendant Oscar Mayer & Co. whose principal business office is Madison, Wisconsin, and as such, is charged with the responsibility of the administration and executive decisions of the Defendant Oscar Mayer & Co., including personnel decisions.

5. That the Defendant N. D. Ottens is the personnel manager with the Defendant Oscar Mayer & Co., and as such, is the executive administrative officer charged with the responsibility of personnel decisions, including terminations and retirements of employees for the Defendant Oscar Mayer & Co.

6. That the Defendant Donald L. Paul is titled plant manager for the said Oscar Mayer & Co., and is charged with all executive and administrative responsibilities, including personnel decisions for the Davenport plant, in Davenport, Iowa.

7. That the Defendant Paul Gould is the livestock procurement service manager for the Defendant Oscar Mayer & Co. at the Davenport plant in Davenport, Iowa, and as such, was the immediate supervisor and superior of the Plaintiff Joseph W. Evans.

8. That the individual defendants above named were the executive officers and administrative officers charged with personnel decisions regarding the Plaintiff in that the Plaintiff was stationed at the "Davenport plant" and was subject to the direction of Defendants Gould, Paul, Ottens, and Bolz.

9. That for a period of approximately twenty-three (23) years up to and including January 31, 1976, Plaintiff was employed by Oscar Mayer & Co., subject to the direction of the above named individual Defendants, as a hog buyer, and was, on or about January 31, 1976, stationed at the Davenport plant, on "relief buyer status" and operating out of Williamsburg, Iowa.

10. That on or about January 31, 1976, even though Plaintiff had not reached the retirement age of sixty-five years, Plaintiff was forced to accept early retirement under threat of termination, by superiors and administrative officers of the Defendant Oscar Mayer & Co.

11. That Plaintiff's forced retirement was for a reason wholly and totally unrelated to his job performance, that is, namely, his age, in that Plaintiff had performed satisfactorily and adequately for a period of twenty-three years for the Defendant Oscar Mayer & Co.

12. That the illegal actions of the Defendants in forcing Plaintiff's involuntary retirement under threat of termination solely for the reason of his age, is the proximate cause of the damages sustained to the Plaintiff herein.

13. That as a result of the illegal actions of the Defendants and each of them, Plaintiff has suffered and will continue to suffer loss of employment benefits, including pay, vacation and sick leave benefits, and all other acoutrements of employment with the Defendant Oscar Mayer & Co., and further, has suffered damages in the amount of pension allowable to him had he retired at the age of sixty-five, the mandatory retirement date with the Defendant Oscar Mayer & Co. That by letter on or about March 10, 1976, pursuant to statutory requirements, Plaintiff served Notice of Intent to Sue on the Secretary of the Department of Labor, United States Government, Washington, D. C. That voluntary compliance and conciliation has not occurred, and more than sixty (60) days has elapsed since the submission of the Notice to the Secretary.

14. That Plaintiff was, on or about January 31, 1976, more than forty (40) and less than sixty-five (65) years of age, and the Defendant Oscar Mayer & Co. was a private employer of twenty (20) or more persons.

Wherefore, Plaintiff prays that this Court shall:

1. Assume jurisdiction of this cause and set the same down for hearing.

2. Issue an Order compelling the Defendants, and each of them, to immediately reinstate the Plaintiff to his former position, with all rights and privileges pertinent and accruing thereto, effective from and after January 31, 1976.

3. Award Plaintiff actual damages payable by the Defendants jointly and severally, for loss of pay and salary increments denied him because of age discriminatory conduct.

4. Award Plaintiff attorney's fees in this action.

5. Award Plaintiff his costs in this action, and such other further and equitable relief as to the Court shall seem just and proper.

/s/ JOSEPH Z. MARKS
Joseph Z. Marks

/s/ JOSEPH L. MARKS
Joseph L. Marks
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Des Moines, Iowa 50309
Telephone: 243-1188

/s/ GORDON ALLEN
Gordon Allen
102 East Grand Avenue
Des Moines, Iowa
Telephone: 243-6101

UNITED STATES DISTRICT COURT

* * (Caption—77-19-D) * *

MOTION OF DEFENDANTS TO DISMISS FOR LACK OF JURISDICTION.

Now come defendants Oscar Mayer & Co., Robert M. Bolz, N. D. Ottens, Donald L. Paul and Paul F. Gould and move this Court, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, to dismiss the above-entitled action for lack of jurisdiction over the subject matter. In support of this Motion, defendants submit the attached Memorandum.

Oscar Mayer & Co.
By /s/ HENRY NEUMAN
Henry Neuman

/s/ ARTHUR J. KOWITT (sg)
Arthur J. Kowitt

/s/ JAMES W. GLADDEN, JR. (sg)
James W. Gladden, Jr.

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RELEVANT STATUTORY PROVISIONS.

Section 14(b) of the Age Discrimination in Employment Act, 29 U. S. C. § 633(b), reads as follows:

> (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority, other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

Section 7(d) of the Age Discrimination in Employment Act, 29 U. S. C. § 626(d), reads as follows:

> (d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

> Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Section 706(c) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5(c), reads as follows:

> (c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purpose of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

Sections 601A.5, 6, and 14 of the Code of Iowa read as follows:

> **Sec. 601A5. Powers and Duties.** The commission shall have the following powers and duties:
>
> (1) To prescribe the duties of a director and appoint and prescribe the duties of such investigators and other employees and agents as the commission shall deem necessary for the enforcement of this chapter.
>
> (2) To receive, investigate, and pass upon complaints alleging unfair or discriminatory practices.

(3) To investigate and study the existence, character, causes, and extent of discrimination in public accommodations, employment, apprenticeship programs, on-the-job training programs, vocational schools, and housing in this state and to attempt the elimination of such discrimination by education and conciliation.

(4) To seek a temporary injunction against a respondent when it appears that a complainant may suffer irreparable injury as a result of an alleged violation of chapter 601A. A temporary injunction may only be issued ex parte, if the complaint filed with the commission alleges discrimination in housing. In all other cases a temporary injunction may be issued only after the respondent has been notified and afforded the opportunity to be heard.

(5) To hold hearings upon any complaint made against a person, an employer, an employment agency, or a labor organization, or the employees or members thereof, to subpoena witnesses and compel their attendance at such hearings, to administer oaths and take the testimony of any person under oath, and to compel such person, employer, employment agency, or labor organization, or employees or members thereof to produce for examination any books and papers relating to any matter involved in such complaint. The commission shall issue subpoenas for witnesses in the same manner and for the same purposes on behalf of the respondent upon his request. Such hearings may be held by the commission, by any commissioner, or by any hearing examiner appointed by the commission. If a witness either fails or refuses to obey a subpoena issued by the commission, the commission may petition the district court having jurisdiction for issuance of a subpoena and the court shall in a proper case issue the subpoena. Refusal to obey such subpoena shall be subject to punishment for contempt.

(6) To issue such publications and reports of investigations and research as in the judgment of the commission shall tend to promote good will among the various racial, religious, and ethnic groups of the state and which shall tend to minimize or eliminate discrimination in public accommodations, employment, apprenticeship and on-the-job training programs, vocational schools, or housing be-

cause of race, creed, color, sex, national origin, religion, ancestry, or disability.

(7) To prepare and transmit to the governor and to the general assembly from time to time, but not less often than once each year, reports describing its proceedings, investigations, hearings conducted and the outcome thereof, decisions rendered, and the other work performed by the commission.

(8) To make recommendations to the general assembly for such further legislation concerning discrimination because of race, creed, color, sex, national origin, religion, ancestry, or disability as it may deem necessary and desirable.

(9) To cooperate, within the limits of any appropriations made for its operation, with other agencies or organizations, both public and private whose purposes are consistent with those of this Chapter, and in the planning and conducting of programs designed to eliminate racial, religious, cultural, and intergroup tensions.

(10) To adopt, publish, amend, and rescind regulations consistent with and necessary for the enforcement of this Chapter.

(11) To receive, administer, dispense and account for any funds that may be voluntarily contributed to the commission and any grants that may be awarded the commission for furthering the purposes of this chapter with the approval of the executive council.

(12) To defer a complaint to a local civil rights commission under commission rules promulgated pursuant to chapter 17A.

Sec. 601A6. Unfair Employment Practices. (1) It shall be an unfair or discriminatory practice for any:

a. Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, national origin, religion or disability of such applicant or employee, unless based upon the nature of the occupation. If a disabled person is qualified to

perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminating practices prohibited by this subsection.

b. Labor organization or the employee, agents, or members thereof to refuse to admit to membership any applicant, to expel any member, or to otherwise discriminate against any applicant for membership or any member, in the privileges, rights or benefits of such membership because of the age, race, creed, color, sex, national origin, or religion, or disability of such applicant or member.

c. Employer, employment agency, labor organization, or the employees, agents, or members thereof to directly or indirectly advertise or in any other manner indicate or publicize that individuals of any particular age, race, creed, color, sex, national origin, religion, or disability are unwelcome, objectionable, not acceptable, or not solicited for employment or membership, unless based upon the nature of the occupation.

If a disabled person is qualified to perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminating practices prohibited by this subsection.

An employer, employment agency, or there employees, servants or agents may offer employment or advertise for employment to only the disabled because of their handicap. Any such employment or offer of employment shall not discriminate among the disabled on the basis of race, color, creed, sex, or national origin.

(2) *Exceptions.* This section shall not apply to:

a. Any employer who regularly employs less than four individuals. For purposes of this subsection, individuals who are members of the employer's family shall not be counted as employees.

b. The employment of individuals for work within the home of the employer if the employer or members of his family reside therein during such employment.

c. The employment of individuals to render personal service to the person of the employer or members of his family.

d. Any bona fide religious institution or its educational facility, association, corporation or society with respect to any qualifications for employment based on religion when such qualifications are related to a bona fide religious purpose.

Sec. 601A.14. Complaints; Hearing. (1) Any person claiming to be aggrieved by a discriminatory or unfair practice may, by himself or his attorney, make, sign, and file with the commission a verified, written complaint in triplicate which shall state the name and address of the person, employer, employment agency, or labor organization alleged to have committed the discriminatory or unfair practice of which complained, shall set forth the particulars thereof, and shall contain such other information as may be required by the commission. The commission, a commissioner, or the attorney general may in like manner make, sign, and filed such complaint.

In an action the plaintiff may recover, if he shows that there was no reasonable cause to believe the ground upon which the complaint was made, the actual damages sustained and reasonable attorney fees to be fixed by the court.

(2) Any employer, labor organization, or other person who has any employees or members who refuse or threaten to refuse to comply with the provisions of this chapter may file with the commission a verified written complaint in triplicate asking the commission for assistance to obtain their compliance by conciliation or other remedial action.

(3) After the filing of a verified complaint, a true copy thereof shall be promptly served by registered mail to the person against whom the complaint is filed. Then a commission or a duly authorized member of the commission's staff shall make a prompt investigation thereof and if such investigating official shall determine that probable cause exists for crediting the allegations of the complaint, the investigating official shall immediately endeavor to eliminate such discriminatory or unfair practice by conference, conciliation, and persuation.

(4) The members of the commission and its staff shall not disclose the filing of a complaint, the information

gathered during the investigation, or the endeavors to elim inate such discriminatory or unfair practice by conference, conciliation, and persuasion, unless such disclosure is made in connection with the conduct of such investigation.

(5) In case of failure to satisfactorily settle a complaint by conference, conciliation, and persuasion, or in advance thereof if in the opinion of the investigating official circumstances so warrant, the official may issue and cause to be served a written notice together with a copy of such complaint, as the same may have been amended, requiring the person, employer, employment agency, or labor organization named in such complaint, hereafter referred to as respondent, to answer the charges of such complaint in writing within ten (10) days after the date of such notice or within such extended time as the investigating official may allow.

(6) When the investigating official is satisfied that further endeavor to settle a complaint by conference, conciliation, and persuasion shall be futile, the official shall report the same to the commission. If the commission determines that the circumstances warrant, it shall issue and cause to be served a written notice requiring the respondent to answer the charges of such complaint at a hearing before the commission, a commissioner, or such other person designated by the commission to conduct the hearing, hereafter referred to as hearing examiner, and at a time and place to be specified in such notice.

(7) The case in support of such complaint shall be presented at the hearing by one of the commission's attorneys or agents. The investigating official shall not participate in the hearing except as a witness nor shall he participate in the deliberations of the commission in such case.

(8) The respondent may file a written verified answer to the complaint, and may appear at the hearing in person, with or without counsel, and submit testimony. In the discretion of the hearing examiner, a complainant may be allowed to intervene and present testimony in person or by counsel.

(9) When a respondent has failed to answer a complaint at a hearing as provided by this section the commis-

sion may enter his default. For good cause shown, the commission may set aside an entry of default within 10 days after the date of such entry. If the respondent is in default, the commission may proceed to hear testimony adduced upon behalf of the complainant. After hearing such testimony, the commission may enter such order as in its opinion the evidence warrants.

(10) The commission or the complainant shall have the power to reasonably and fairly amend any complaint and the respondent shall have like power to amend his answer.

(11) The commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity but the right of cross-examination shall be preserved. Complainant shall bear the burden of proving the allegations in his complaint. The testimony taken at a hearing shall be under oath, reported, and, if ordered by the commission transcribed.

(12) If, upon taking into consideration all the evidence at a hearing, the commission shall find that a respondent has engaged in or is engaging in, any discriminatory or unfair practice as defined in this chapter, the commission shall state its findings of fact and shall issue and cause to be served upon such respondent an order requiring such respondent to cease and desist from such discriminatory or unfair practice and to take such affirmative action, including, but not limited to, hiring, reinstatement, or upgrading of employees, with or without back pay, the referring of applicants for employment by any respondent employment agency, the admittance or restoration to membership by any respondent labor organization, the admission to or continuation in enrollment in an apprenticeship program, on-the-job training program, the posting of notices, and the making of reports as to the manner of compliance, as in the judgment of the commission shall effectuate the purposes of this chapter.

(13) If, upon taking into consideration all the evidence at a hearing, the commission shall find that a respondent has not engaged in any such discriminatory or unfair practice, the commission shall state its findings of fact and shall

issue and cause to be served an order on the complainant and the respondent dismissing the complaint.

(14) The commission shall establish rules to govern, expedite, and effectuate the procedures established by this chapter and its own actions thereunder.

(15) Any complaint filed under this chapter shall be so filed within 120 days after the alleged discriminatory or unfair practice occurred.

Supreme Court, U. S.
FILED
SEP 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-275

OSCAR MAYER & CO., ROBERT M. BOLZ, N.D. OTTENS, DONALD L. PAUL, PAUL F. GOULD,

Petitioners,

vs.

JOSEPH W. EVANS,

Respondent.

BRIEF OF RESPONDENT, JOSEPH W. EVANS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

OSCAR MAYER & CO., ROBERT M. BOLZ, N.D. OTTENS, DONALD L. PAUL, PAUL F. GOULD,

Petitioners,

vs.

JOSEPH W. EVANS,

Respondent.

BRIEF OF RESPONDENT, JOSEPH W. EVANS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondent, Joseph W. Evans, respectfully prays that a writ of certiorari be denied, and that this Court decline to review the judgment of the United States Court of Appeals for the 8th Circuit entered in this case on July 6, 1978.

INTRODUCTION

Respondent, Joseph W. Evans, accepts the Petitioners' statement of jurisdiction; the question presented, the statute involved, and the statement of the case, in this matter.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

CLEAR AND RECENT PRECEDENT INDICATES THAT FILING A CLAIM OF AGE DISCRIMINATION IN A TIMELY FASHION WITH AN APPROPRIATE STATE AGENCY IS NOT A MANDATORY PREREQUISITE TO THE INSTITUTION OF A CIVIL SUIT UNDER THE ADEA.

Of the four circuit courts of appeal to have directly ruled on the question of whether Section 14(b) of the ADEA is a mandatory prerequisite to the institution of a civil suit under ADEA (all within the past six months), only the United States Court of Appeals for the 2nd Circuit has ruled that Section 14(b) of ADEA imposes such a mandatory prerequisite. Interestingly, the 2nd Circuit reached its decision prior to the decisions of the 6th, 8th and 3rd Circuits, and thus did not have the benefit of their holdings. *Gabriele v. Chrysler Corp.*, 573 F.2d 949 (6th Cir. April 7, 1978); *Evans v. Oscar Mayer & Co.*, No. 77-1692 (8th Cir.

July 6, 1978) (*en banc* rehearing denied July 7, 1978); *Holliday v. Ketchum, MacLeod & Grove*, 17 FEP 1175, No. 77-140 (3rd Cir. July 14, 1978) (unanimous *en banc*); *Reich v. Dow Badische Co.*, 17 FEP 363, No. 76-7637 (2nd Cir. April 4, 1978).

Further, to the extent that the 2nd Circuit's decision in *Reich* was based on the 3rd Circuit's previous holding in *Goger v. H.K. Porter Co., Inc.*, 492 F.2d 13 (3rd Cir. 1974), it is misplaced, in that *Goger* was expressly overruled by the 3rd Circuit in their unanimous, *en banc* decision in *Holliday v. Ketchum, MacLeod & Grove*, 17 FEP 1175, No. 77-140 (3rd Cir. July 14, 1978) (unanimous *en banc*). The Petitioners, on page 4 of their Writ of Certiorari, also cite the case of *Curry v. Continental Airlines*, 513 F.2d 961 (9th Cir. 1975), to support their argument that the 9th Circuit has reached the conclusion that Section 14(b) of ADEA is a mandatory prerequisite to the filing of a federal action under ADEA. Respondent takes exception to this characterization of the holding in *Curry*, and interprets the language in *Curry* to be *dicta*. In any event, the significant reliance in *Curry* on the now overruled *Goger* decision renders the holding in *Curry* suspect. Thus, given the fact that the *Goger* decision has been reversed by the 3rd Circuit, consequently diminishing in importance the holdings which relied heavily on that decision, the clear and recent trend in authority has established that Section 14(b) of the ADEA is not a mandatory prerequisite to the institution of a civil suit under ADEA.

II.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN THIS CASE PROPERLY CONSTRUED SECTION 14(b) OF THE ADEA SO AS NOT TO REQUIRE A FILING WITH AN APPROPRIATE STATE AGENCY AS A MANDATORY PREREQUISITE TO THE INSTITUTION OF A CIVIL SUIT UNDER THE ADEA.

With regard to whether or not Section 14(b) of ADEA is a mandatory prerequisite to the filing of a civil action in Federal Court, the Court below held:

> ". . . We now hold that if an individual complaining about alleged discrimination against him in employment on account of his age in fact files a complaint with a state fair employment practice agency like the Iowa Civil Rights Commission, he must observe the waiting period prescribed by §633(b). We do not think, however, that an individual is required to file a complaint with a state agency before coming into federal court, assuming that he complies with the basic waiting period prescribed by §626(d). In our opinion, such an individual has the option of proceeding first before the state agency and then in the federal court or proceeding initially in the federal court without prior resort to the state agency." *Evans v. Oscar Mayer & Co.*, 117 FEP 1175, No. 77-140 (3rd Cir. July 14, 1978) (unanimous *en banc*).

In *Gabriele v. Chrysler Corp.*, 573 F.2d 949, 955 (6th Cir. April 7, 1978), the United States Court of Appeals for the 6th Circuit decided the identical question decided the previous day in *Evans*, and held that:

> "We determine that 29 U.S.C. §633(b) does not require prior resort to an available state agency as a prerequisite to an ADEA suit in federal court. Rather, it gives an aggrieved person the option of pursuing state remedies."

The holdings in *Evans* and *Gabriele* were followed by the United States Court of Appeals for the 3rd Circuit, when the 3rd Circuit reversed, unanimously, *en banc*, their previous holding in *Goger v. H.K. Porter Co., Inc.*, 492 F.2d 13 (3rd Cir. 1974), and in the case of *Holliday v. Ketchum, MacLeod & Grove*, 17 FEP 1175, No. 77-140 (3rd Cir. July 14, 1978) (unanimous *en banc*). Thus, *Evans, Gabriele*, and *Holliday* clearly hold that the filing with an appropriate state agency is optional and not a mandatory prerequisite to a civil suit in Federal Court under the ADEA.

Throughout the entire course of litigation in this case, Oscar Mayer & Company has consistently and unsuccessfully attempted to analogize Section 14(b) of the ADEA to somewhat similar language appearing in Section 706(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(c).

The United States Court of Appeals for the 3rd Circuit, following the United States Supreme Court's interpretation of the ADEA in *Lorillard v. Pons*, 434 U.S. 575 (1978), specifically rejected this analogy between the procedures prescribed under the ADEA and Title VII when it held in *Holliday v. Ketchum, MacLeod & Grove*, 17 FEP 1175, 1178, No. 77-140 (3rd Cir. July 14, 1978) (unanimous *en banc*):

> "As we have previously noted, the majority opinion in *Goger* reached its conclusion through

an almost exclusive reliance on an analogy between procedures prescribed under Title VII and those applicable under the ADEA. We now know however that such reliance was unwarranted. Rather, procedures are to be imported from the FLSA, a statute which does not require any, let alone prior, resort to state proceedings in order to redress FLSA violations. 29 U.S.C. §§216, 217. The critical premise supporting the majority opinion's reasoning in *Goger* having been undercut by the Supreme Court's interpretation of the ADEA, the *Goger* conclusion that prior state resort is necessary must also fall.

In sum, *Lorillard* compels us to disavow the *Goger* majority's reliance on an analogy to Title VII procedure—a reliance which it now appears was 'misplaced.' 46 LW at 4152, 16 FEP Cases at 888."

Thus, Oscar Mayer & Company's reliance on the analogy between ADEA and Title VII is clearly unwarranted. Further, there are several additional independent grounds supporting the construction given Section 14(b) of the ADEA by the United States Court of Appeals for the 8th Circuit.

First, the very language of the ADEA itself soundly supports the conclusion reached by the United States Court of Appeals for the 8th Circuit that filing a claim of age discrimination in a timely fashion with an appropriate state agency is not a mandatory prerequisite to the institution of a civil suit under ADEA. As the Court stated in *Holliday v. Ketchum, MacLeod & Grove*, 17 FEP 1175, 1179, No. 77-140 (3rd Cir. July 14, 1978) (unanimous *en banc*):

"The language of the ADEA itself strongly supports our conclusion that no initial resort to state age discrimination remedies is required. The statute nowhere explicitly imposes a resort to state proceedings as a precondition to instituting federal suit. The provision most likely to have dealt with this subject—the jurisdictional provision—does not even suggest, let alone require, prior utilization of available state machinery. 29 U.S.C. §§626(c), (d), as amended, 29 U.S.C.A. §§626(c), (d) (supp. 1 June, 1978). Similarly, the FLSA does not require nor intimate that prior resort to state administrative machinery is necessary to enforce its provisions. Id. §§216, 217. Indeed, the FLSA prescribes precisely the opposite procedure: a complainant is afforded a choice of forum to enforce the provisions of the statute. Id. §216(b)."

Secondly, the ADEA cannot "be construed as even impliedly requiring a resort to state remedies. Here, 29 U.S.C. §633 is relevant." *Holliday, supra*, at 1179. In discussing the importance of 29 U.S.C. §633 as evidence of the fact that there is no mandatory state resort requirement, the Court of Appeals for the 6th Circuit held in *Gabriele, supra*, at 953, 954:

> "Moreover, §633(a) has no parallel in Title VII. Title VII also does not require exhaustion of state remedies but only the initiation thereof, *Crosslin v. Mountain States Tel. & Tel. Co.*, 422 F.2d 1028, 1031 n5. (9th Cir. 1970), but Title VII has no provision for superseding state proceedings merely by beginning federal action. *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1212 (1971). The ADEA thus exhibits lesser deference to the states than does Title VII and gives us no compulsion to require state action as a prerequisite to an ADEA suit."

Thirdly, Congress itself has recently expressed its views as they bear upon the issue before us. On April 6, 1978, the President signed into law the Age Discrimination in Employment Act Amendments of 1978 (Public Law 95-256). Section 4(b)(1) of the ADEA Amendments amends Section 7(d) of the Act, 29 U.S.C. §626(d), which sets forth the procedural prerequisites to a private action, to provide that merely a "charge" rather than a "notice of intent to sue" be filed with the Secretary of Labor. With regard to that amendment, the "Joint Explanatory Statement of the [House-Senate] Committee Conference on the ADEA Amendments" states (Conf. Rep., H.R. Rep. No. 95-950, 95th Cong., 2d Sess., p. 12 [1978], emphasis added):

> "*Conference agreement*
>
> The House recedes with an amendment retaining the 180-day and 300-day time limitations in section 7(d), but requiring that a 'charge' rather than a 'notice of intent to sue' be filed with the Secretary of Labor within this period. *The 300-day limitation and related State deferral procedures are described in more detail in Senate Report 95-493 at pages 5 to 7. The conferees adopt this discussion in the Senate report.*" (Emphasis supplied.)

The Senate Human Resources Committee Report on the ADEA Amendments (S. Rep. No. 95-493, 95th Cong., 1st Sess. [1977]), referred to in the Joint Explanatory Statement, states in pertinent part (pages 6-7, emphasis added):

> "Section 14(b) of the Act provides that where an act of discrimination occurs in a State which has an age discrimination law and an agency em-

> powered to grant or seek relief from such discriminatory practices, no suit may be brought under section 7 of this Act before the expiration of sixty days after proceedings have been commenced under State law, unless such proceedings have been earlier terminated. This provision requires that *if the individual chooses to apply first to the State agency* for relief he must give the State the prescribed minimum period in which to take remedial action before he may turn to the federal courts for relief under the ADEA. *The provision does not require that the individual go to the State first in every instance.*"

Several courts have properly recognized the distinction. See e.g., *Smith v. Jos. Schlitz Brewing Company*, 419 F. Supp. 770, 774 (D.N.J. 1976); *Vazquez v. Eastern Air Lines*, 405 F. Supp. 1353, 1356 (D.P.R. 1975); *Bertrand v. Orkin Exterminating Company*, 419 F. Supp. 1123, 1126 (N.D. Ill. 1976); *Goger v. H.K. Porter Company*, 492 F.2d 13, 17-18 (C.A. 3, 1974) (Garth, J., concurring).

Other courts, however, have ruled that the complainant must go initially to the State authorities in every instance, and that the failure to do so requires dismissal of the federal action. See *Vaughn v. Chrysler Corp.*, 382 F. Supp. 143 (E.D. Michigan 1974); *Smith v. Crest Communities, Inc.*, 8 FEP Cases 1328 (W.D. Ky. 1974); *Fitzgerald v. New England Tel. & Tel. Co.*, 416 F. Supp. 617 (D. Mass. 1976); see also *Goger v. H.K. Porter Co.*, 492 F.2d 13 (C.A. 3, 1974).

It is the committee's view that *an individual who has been discriminated against because of age is free to proceed either under state law or under federal law. The choice is up to the individual.* However, as Section 14(b) makes clear, *if* the individual does choose to proceed initially under

State law, he must give the State agency at least 60 days to take remedial action before he may commence a federal action." (Emphasis supplied.)

With regard to the above Congressional intent, the United States Court of Appeals for the 3rd Circuit commented in *Holliday, supra*, at 1180-81:

"It is a rare and welcome event to discover legislative history so unambiguous. Slightly more problematic however is the impact of a 1978 joint committee report on our interpretation of a 1967 enactment. Certainly the intent of the 1978 amenders of the ADEA cannot be said to represent or reflect the intent of the 1967 Congress: there is no necessary relation back. Yet an interpretation of the ADEA which was feasible, if not preferable, before 1978 has now been officially ratified by the joint congressional committee assigned to study and recommend changes in the statute. We recognize, as did the Supreme Court, that although the views of a subsequent Congress 'provide no controlling basis' for inferring original congressional intent, '[n]onetheless, it is pertinent to note [the views of a subsequent congressional committee] . . . reporting . . . on certain proposed amendments to the Act.' *Haynes v. United States*, 390 U.S. 85, 87-88 n.4 (1968). In *Haynes* the Supreme Court was referring to the House Ways and Means Committee which reported on amendments to the National Firearms Act. *A fortiori* the views of a joint congressional committee are entitled to consideration and weight in our re-examination of the contours of sections 626(d) and 633(b) of the ADEA."

Thus, it is clear that the Congressional intent of the ADEA legislation was to provide an aggrieved individual with the *option* of pursuing state administrative relief if the individual so desired, but that this step was never intended to operate as a procedural bar to a Federal civil suit under the ADEA.

Finally, it is important to consider whether a mandatory state resort requirement read into Section 14(b) of the ADEA would effectuate or frustrate the purposes of the ADEA. It is important to note that this is remedial legislation, designed "to promote employment of older persons based on their ability rather than age", 29 U.S.C. §621(b), and is entitled to a liberal construction. *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92, 93-94 (8th Cir. 1975); *Skoglund v. Singer Co.*, 403 F. Supp. 797, 801 (D.N.H. 1975); *Woodford v. Kinney Shoe Corp.*, 369 F. Supp. 911, 914 (N.D. Ga. 1973). The particular need for a "quick dispute resolution is acute in the ADEA context since the very cause of the alleged discrimination, age, grows daily. An older person should be allowed to choose the quicker of the two available remedies and not be forced to first choose the state remedy if that would unduly impede him in the resolution of his grievance." *Gabriele v. Chrysler Corp.*, 573 F.2d 949 (6th Cir. April 7, 1978).

CONCLUSION

For all of the foregoing reasons, Joseph W. Evans respectfully requests that a writ of certiorari be denied and that the judgment and decision of the United States Court of Appeals for the 8th Circuit in this case be allowed to stand.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-275

OSCAR MAYER & CO., ET AL.,
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BRIEF FOR PETITIONERS OSCAR MAYER & CO., ROBERT M. BOLZ, N. D. OTTENS, DONALD L. PAUL, PAUL F. GOULD.

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OPINIONS BELOW.

The Opinion of the District Court for the Southern District of Iowa of July 8, 1977, denying petitioners' Motion to Dismiss is reported unofficially at 17 FEP Cases 218 and is reproduced in the Appendix to the Petition for a Writ of Certiorari (Cert. Pet. App. A1-A7). The Opinion of the Eighth Circuit Court of Appeals of April 5, 1978, reversing the trial court, is reported unofficially at 17 FEP Cases 221 and is reproduced in the Appendix to the Petition for a Writ of Certiorari (Cert. Pet. App. A8-A14). The Eighth Circuit Court of Appeals' Opinion on Rehearing issued on July 6, 1978, withdrawing its Opinion

of April 5, 1978, and affirming the trial court, is reported at 580 F. 2d 1298 and is reproduced in the Appendix to the Petition for Certiorari (Cert. Pet. App. A15-A21).

JURISDICTION.

The opinion by a divided panel of the Court of Appeals was entered on July 6, 1978 (Cert. Pet. App. A15-A21). Petition for rehearing en banc was denied on July 7, 1978 (Cert. Pet. App. A22). The Court granted the writ of certiorari on October 30, 1978. Jurisdiction is conferred on this Court by 28 U. S. C. § 1254(1).

STATUTES INVOLVED.

This case involves the interpretation and application of Section 14(b) of the Age Discrimination in Employment Act, 29 U. S. C. § 633(b) (hereinafter referred to as the "ADEA") and Section 706(c) of Title VII of the Civil Rights Act of 1964 as amended, 42 U. S. C. § 2000e-5(c). The relevant portion of Section 14(b) reads as follows:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated . . . .

The relevant portion of Section 706(c) reads as follows:

> In the case of an alleged unlawful employment practice occurring in a State, . . . which has a . . . law prohibiting the unlawful employment practice alleged and establishing or authorizing a State . . . authority to grant or seek relief from such practice . . ., no charge may be filed . . . by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State . . . law unless such proceedings have been earlier terminated . . . .

Also relevant are section 7(d) of the ADEA, 29 U. S. C. § 626(d) and sections 601A5, 6, and 14 of the Code of Iowa. All of these statutory provisions are set forth in full in the Appendix (App. 8).*

QUESTION PRESENTED.

In states having laws prohibiting age discrimination in employment and establishing agencies to grant or seek relief from such discriminatory practices, is the filing of a charge of age discrimination with such a state agency a mandatory prerequisite to filing a civil suit in federal district court raising such claims under the ADEA?

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* Since the initiation of this lawsuit, section 7(d) has been amended by the 1978 Amendments to the Age Discrimination in Employment Act, Pub. L. 95-256, 92 Stat. 189. The Amendments are not relevant to the questions raised in this case.

STATEMENT OF THE CASE.

Petitioner Oscar Mayer & Co. ("Oscar Mayer"), a corporation incorporated under the laws of the state of Delaware and licensed to do business in Iowa, owns and operates a meat processing plant in Davenport, Iowa. Petitioners Robert M. Bolz, N. D. Ottens, Donald L. Paul, and Paul F. Gould are employed by Oscar Mayer in executive and administrative capacities. Respondent has alleged that these individuals are responsible for making personnel decisions affecting employees at the Davenport plant. (App. 3-4.)

Respondent was employed by Oscar Mayer as a hog buyer for 23 years until his retirement on January 31, 1976. He reported to the Davenport plant, and operated out of and resided in Williamsburg, Iowa. (App. 4.)

On March 10, 1976, respondent filed with the United States Department of Labor a notice of intent to sue under the ADEA, claiming that he was "forced" to retire and that his termination was in violation of the ADEA (App. 4).

The Iowa Civil Rights Act of 1965, as last amended in 1977, provides that it is unlawful for any employer "to refuse to hire, . . . to discharge any employee, or to otherwise discriminate in employment . . . against any employee because of the age . . . of such . . . employee." Section 601 A.6, Code of Iowa. Further, the Act establishes the Iowa State Civil Rights Commission "to receive, investigate and pass upon complaints alleging unfair or discriminatory practices." Section 601 A.5(2), Code of Iowa. Any person claiming to have been discriminated against is to file a complaint with the Commission within 120 days of the alleged discriminatory practice. Section 601 A.14(1), (15), Code of Iowa. If the Commission is unable to settle the complaint, it may hold an evidentiary hearing and, if it finds a violation of the Iowa Act, issue a cease and desist order and direct the employer to take affirmative action including reinstatement of the complaining employee with back pay. Section 601 A.14(6), (12), Code of Iowa.

Despite these statutory provisions, respondent never filed a complaint with the Iowa State Civil Rights Commission. Instead, on March 7, 1977, one year after filing his notice of intent to sue with the United States Department of Labor, he filed a complaint in the United States District Court for the Southern District of Iowa, Davenport Division, alleging that the termination of his employment at Oscar Mayer on January 31, 1976 constituted age discrimination prohibited by the ADEA.

Petitioners moved the district court to dismiss the complaint for lack of jurisdiction over the subject matter due to respondent's failure to file a timely complaint of age discrimination with the Iowa State Civil Rights Commission as required by Section 14(b) of the ADEA, 29 U. S. C. § 633(b). On August 8, 1977, this motion was denied by the trial judge who held that the filing of an age discrimination claim with a state agency was not a prerequisite to the institution of a civil suit under the ADEA (Cert. Pet. App. A1-A7).

On appeal, the Court of Appeals for the Eighth Circuit, on April 5, 1978, initially reversed the decision of the district court and held that resort to the state agency was required under the ADEA. Judge Bright, writing for the majority stated (Cert. Pet. App. 11):*

> We conclude that, in a state having laws that prohibit age discrimination and having an agency with authority to seek relief from such practices, filing a charge with the state agency is mandatory under the ADEA and is a prerequisite to the filing of an action in federal court.

Respondent filed a petition for rehearing and suggestion for rehearing en banc. Respondent's petition was supported by the Secretary of Labor, who, on April 26, 1978, was permitted to file an amicus curiae brief. On July 6, 1978, a divided panel of the Court of Appeals withdrew its opinion of April 5, 1978 and affirmed the district court's order. Judge Henley, who

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* Judge Bright was joined in his opinion by Judge Talbot Smith, United States Senior District Judge, Eastern District of Michigan, sitting by designation. Judge Henley dissented.

originally dissented, wrote the majority Opinion on Rehearing, noting that "the authorities are in conflict, and the question is not free from doubt". He went on to hold, however, that the "preferable view" was that an individual was not required to file a complaint with a state agency before instituting a civil suit in federal court. (Cert. Pet. App. A18-A19.)*

SUMMARY OF ARGUMENT.

The plain language of Section 14(b) sets forth a mandatory prerequisite to the filing of a civil suit in federal court alleging claims of age discrimination. This interpretation is supported by the identity of language between Section 14(b) and the state deferral provisions of Title VII of the Civil Rights Act of 1964, § 706(c), 42 U. S. C. § 2000e-5(c), which has consistently been interpreted to require claimants to file charges of discrimination with state authorities before proceeding on the federal level. Further, Section 14(b) is phrased similarly to Section 7(d) of the ADEA which sets forth other procedural requirements uniformly interpreted as jurisdictional prerequisites to the filing of a federal lawsuit.

The legislative history of the ADEA indicates that Congress desired to structure the Act in a manner that would encourage the settlement of age discrimination claims in the most expeditious fashion possible with formal proceedings being utilized only as a last resort. This purpose is frustrated by the decision of the court below, which held that filing with state authorities is not mandatory and thus increases the likelihood of individual claims of age discrimination ripening into litigation.

During the Congressional hearings on the ADEA, testimony was offered suggesting that the Act have state deferral provisions modelled after Title VII. This testimony was never

* Judge Henley was joined by Judge Smith who had concurred in the court's original opinion that an individual was required to file a timely complaint with a state agency before instituting suit under the ADEA. Judge Bright, consistent with his opinion of April 5, 1978, dissented to the court's opinion of July 6, 1978.

disputed or debated but, as noted above, Section 14(b), as it was subsequently enacted, is phrased identically to Section 706(c) of Title VII. This demonstrates that Section 14(b) was modelled after Section 706(c) and should be interpreted accordingly.

ARGUMENT.

I. Introduction

The sole issue before the Court is the interpretation and application of Section 14(b) of the ADEA. Petitioners contend that in states having laws prohibiting age discrimination in employment and establishing authorities to enforce these laws, Section 14(b) *requires* an aggrieved individual to file a timely charge of age discrimination with the state authority and to give that state authority at least sixty days to resolve the charge before instituting an action in federal court.

Despite the clear language of the statute, respondent interprets Section 14(b) as being optional in nature. He contends that Section 14(b) allows each individual who feels aggrieved to determine for himself whether he wishes to utilize available state remedies. But if he does file a timely charge of age discrimination with the state authority, even respondent concedes that he must then wait as least sixty days before instituting an action under the ADEA in federal court.

The implications of this question upon the well-expressed desires of both the federal and state governments to remove all vestiges of age discrimination from employment are profound. The only federal authority empowered to enforce laws against age discrimination is the Department of Labor. Its powers are limited to attempting to resolve claims of age discrimination by informal pursuasion and conciliation and, if it chooses to do so, as a last resort, by instituting suit. *See* 29 U. S. C. § 626(b).

Past experience has demonstrated that since the passage of the ADEA in 1967, the Department of Labor has been largely unequipped to deal to any significant degree with individual charges of age discrimination. As Senator Peter Domenici observed during Senate Hearings concerning the proposed legislation that became the 1978 Amendments to the ADEA:

> [W]hen the Age Discrimination in Employment Act of 1967 was originally enacted, Congress was acting out of the best of intentions. But it has been diffidently enforced by the Labor Department, resisted by both labor and management, and for many years supported in a rather lukewarm fashion by middle age and older workers.

Hearings Before the Subcommittee on Labor of Senate Committee on Human Resources on S. 1784, 95th Cong., 1st Sess. at 51 (1977).

During House hearings, Representative William Randall expressed similar sentiments:

> [I]n spite of their [the Department of Labor] hard work and dedication, and some increased funding for manpower, the backlog of ADEA cases grows year after year most damatically. ADEA is only one of 82 statutes for which compliance officers have responsibility.
>
> The Department of Labor has had unloaded on it 82 different enforcement jobs. We find that ADEA activities account for only about 5 percent of the Department of over 1,100, assigned full time to ADEA activities.
>
> In other words, not a one is devoting his full time to ADEA.

Hearings Before Subcommittee on Equal Opportunities of the House Committee on Education and Labor on H. R. 14879 and H. R. 15342, 94th Cong., 2d Sess. at 5 (1976).

It is thus clear that state authorities enforcing state laws against age discrimination are a necessary, effective, and viable mechanism by which laws against age discrimination in employment can be enforced short of individual lawsuits in federal court. To this end, thirty states, as well as the District of Columbia and Puerto Rico, have promulgated laws prohibiting age discrimination *and* have established authorities to enforce these laws.*

* An additional eight states have passed age discrimination laws, but have not established authorities to enforce these statutes.

Petitioners' interpretation of Section 14(b) requires aggrieved individuals to take advantage of these state authorities and thus maximizes the possibility of resolving claims of age discrimination before they reach the federal courts. Respondent's position that each aggrieved individual has the option of filing a charge with the state agency or, after notifying the Department of Labor, of proceeding directly in federal court, allows any person with an age discrimination complaint to completely ignore available administrative avenues of relief.

We submit that respondent's position leads to undue congestion of federal court calendars with age discrimination cases which may otherwise be resolved through the administrative processes. Such a result is not only undesirable but, as discussed below, is contrary to the clear language of the ADEA and the Congressional intent behind the statute.

II. The Plain Language of Section 14(b), Its Identity with Section 706(c) of Title VII, and Its Relationship to Section 7 of the ADEA Establishes That State Filing Is Mandatory Under the ADEA.

A. A Mandatory Prerequisite is Established by the Plain Language of Section 14(b).

Section 14(b) expressly provides that filing with a state agency is mandatory. It states:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, *no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated.* . . . (Emphasis added.)

The State of Iowa has a law prohibiting age discrimination in employment and has established the Iowa State Civil Rights

Commission to grant or seek relief from such discriminatory practices. Section 601 A.5, 6, Code of Iowa. Respondent has never contested the fact that the Iowa Commission satisfies the requirements of Section 14(b). Further, respondent concedes that he never made any resort to the Iowa Commission for relief.

In its opinion on rehearing, the court below held that *"an individual has the option* of proceeding first before the state agency and then in the federal court or of proceeding initially in the federal court without prior resort to the state agency" (Emphasis added; Cert. Pet. App. A19). This is completely inconsistent with the plain language of section 14(b) which provides that *"no suit may be brought . . . before the expiration of sixty days after proceedings have been commenced under the State law"* (emphasis added).

This plain language led the Second Circuit Court of Appeals, in direct contrast to the court below, to conclude that Section 14(b) sets forth a mandatory prerequisite to a civil suit under the ADEA. In *Reich* v. *Dow Badische Co.*, 575 F. 2d 363, 370 (2d Cir. 1978), the Second Circuit held:

> Much of appellant's argument mistakenly proceeds on the tacit premise that resort to the state remedy is a technical step devoid of substantive content, and that, therefore, the slightest of showing will warrant setting the bar of Section 633(b) aside. That ignores the paramount circumstances, that the state remedy, or rather remedies, presented appellant with a full and adequate system of relief, that there was no reason for turning to the federal remedy that did not equally direct appellant to the state remedies, and that the scheme of the ADEA very explicitly requires that the grievant timely present his claim to the state authority before suing.

B. The Identical Wording of Section 14(b) of the ADEA and Section 706(c) of Title VII Establishes That They Should Be Interpreted in the Same Manner.

Section 14(b) is couched in language almost identical to that appearing in Section 706(c) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5(c), which provides as follows:

> In the case of an alleged unlawful employment practice occurring in a State, . . . which has a . . . law prohibiting the unlawful employment practice alleged and establishing or authorizing a State . . . authority to grant or seek relief from such practice . . ., *no charge may be filed . . . by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State . . . law unless such proceedings have been earlier terminated.* . . . (Emphasis added.)

When enacting Title VII, Congress intended Section 706(c) to require prior resort to state agencies. This was made clear by the following remarks of Senator Humphrey concerning pending legislation that ultimately became the Civil Rights Act of 1964 (110 Cong. Rec. 12721 (1964)):

> If the practice complained of occurs in a State or locality which has a law prohibiting such practices and establishing an agency to deal with them . . . the individual complainant cannot file his charge with the Commission until the State or local agency has been given an opportunity to handle this problem under State or local law. However, after the agency has had 60 days to adjust the complaint or after it terminates proceedings on it, the complainant may go to the Federal Commission.

The federal courts have uniformly held that an individual must resort to appropriate state agencies before suit may be brought under Title VII. *Love* v. *Pullman Co.*, 404 U. S. 522 (1972); *Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228 (8th

Cir. 1975); *Local 5, Electrical Workers* v. *EEOC*, 398 F. 2d 248 (3d Cir.), *cert. denied* 393 U. S. 1021 (1968). The Tenth Circuit Court of Appeals explained the rationale behind these decisions in *Dubois* v. *Packard Bell Corp.*, 470 F. 2d 973, 975 (10th Cir. 1972):

> When . . . Title VII was being debated on the Senate floor there were strong objections to the manner in which its original provisions would have bypassed efforts at the state or local level to correct unfair employment practices. The final bill, accordingly, included the "Dirksen Amendment" as a compromise to expedite its passage. As Senator Humphrey explained, subsections 706(b) and (d) of the amended bill guarantee that the states . . . will be given every opportunity to employ their expertise and experience . . . before federal agencies are resorted to.

As noted above, Section 14(b) of the ADEA is phrased almost identically to Section 706(c) of Title VII. This identity of language, coupled with the legislative history and judicial interpretations of section 706(c), have led the overwhelming majority of federal courts interpreting Section 14(b) to conclude, contrary to the court below, that this provision sets forth a mandatory prerequisite to a civil suit under the ADEA. *See, e.g., Reich* v. *Dow Badische Co.*, 575 F. 2d 363 (2d Cir. 1978); *Curry* v. *Continental Airlines*, 513 F. 2d 691 (9th Cir. 1975); *Enos* v. *Kaiser Industries Corp.*, 443 F. Supp. 798 (D. D. C. 1978); *Fitzgerald* v. *New England Telephone Co.*, 416 F. Supp. 617 (1976), *modified*, 437 F. Supp. 635 (D. Mass. 1977); *Bertsch* v. *Ford Motor Co.*, 415 F. Supp. 619 (E. D. Mich. 1976); *Berry* v. *Crocker Nat'l Bank*, 13 FEP Cases 673 (N. D. Cal. 1976); *Acford* v. *Exxon Corp.*, 12 FEP Cases 1500 (D. Conn. 1975); *Arnold* v. *Hawaiian Telephone Co.*, 12 FEP Cases 400 (D. Hawaii 1975); *McGinley* v. *Burroughs Corp.*, 407 F. Supp. 903 (E. D. Penn. 1975); *Smith* v. *Crest Communities Inc.*, 8 FEP Cases 1328 (W. D. Ky. 1974); *Forman* v. *Block Drug Co.*, 16 FEP Cases 414 (E. D. N. Y. 1977); *Prater* v. *Shell Oil Co.*, 15 FEP Cases 1114 (W. D. Ky. 1977).

Most recently, this principle was reaffirmed in *Hadfield* v. *Mitre Corp.*, Civil Action No. 74-2946-S, 47 U. S. L. W. 2338 (D. Mass. 1978), where the court adopted this line of authority establishing the mandatory nature of Section 14(b). As the Ninth Circuit Court of Appeals held in *Curry* (513 F. 2d at 693):

> [W]e concur in the reasoning of those courts that have held decisions interpreting 42 U.S.C. § 2000e-5(b) [as amended 42 U.S.C. § 2000e-5(c)] . . . to be generally applicable for purposes of interpreting § 633(b). . . . "The minor differences between § 633 and its counterpart under the 1964 Act are insignificant and provide no support for an interpretation of the former which is contrary to" interpretations of the latter. [Footnote and citations omitted.]

The majority opinion of the court below simply ignored the similarity between Section 706(c) and Section 14(d). Instead, the court rested its opinion on its belief that while "the authorities are in conflict and the question is not free from doubt", the "preferable view" was that an individual was not required to file a complaint with a state agency before instituting a civil suit (Cert. Pet. App. A18-A19).

Some precedent does exist, in addition to the opinion of the court below, in support of respondent's theory that Section 14(b) is not mandatory. *E.g.*, *Holliday* v. *Ketchum, MacLeod & Grove, Inc.*, ... F. 2d ....., 17 FEP Cases 1175 (3d Cir. 1978); *Gabriele* v. *Chrysler* Corp., 573 F. 2d 949 (6th Cir. 1978). However, the attempts of these courts to distinguish Section 14(b) from Section 706(c) are completely unconvincing.*

In *Gabriele*, the Sixth Circuit Court of Appeals attempted to distinguish Section 14(b) from Section 706(c) by pointing to

* The Secretary of Labor filed an amicus brief in the court below supporting respondent's petition for rehearing. The Secretary's views, setting forth the arguments accepted in *Gabriele* and *Holliday*, are by no means controlling particularly since the Department of Labor is not authorized under the ADEA to issue interpretive regulations or guidelines. *See General Electric Co.* v. *Gilbert*, 429 U. S. 125, 141-146 (1976).

Section 14(a) of the ADEA which states that once action is commenced in federal court under the ADEA, all state proceedings are superseded. The *Gabriele* court noted that there is no counterpart to Section 14(a) in Title VII and concluded that Congress would not have imposed a mandatory prerequisite to the filing of a civil suit which could be cut off after only sixty days had passed by the commencement of a federal action. The court also noted that Section 706(c) prevented *all* federal action for a period of sixty days while the state agency has exclusive jurisdiction over the claim. The ADEA contemplates the possibility of concurrent administrative action on the federal level by the United States Department of Labor since an aggrieved individual can file a notice of intent to sue with that agency at the same time state proceedings are initiated.*

These distinctions led the Sixth Circuit to conclude that Congress intended the ADEA to give "*lesser* deference" to state enforcement mechanisms than is the case under Title VII. 573 F. 2d at 954 (emphasis added). However, interpreting Section 14(b) to give an individual *the option* of resorting to appropriate state agencies is tantamount to giving the states *no* deference at all. The existence of Section 14(a) and the absence of an exclusive period of state jurisdiction in no way warrants such a revocation of any deference whatsoever to state authorities.

In *Holliday*, the Third Circuit Court of Appeals, in addition to noting the same distinctions between Title VII and the ADEA as were recognized in *Gabriele*, also relied upon *Lorillard* v. *Pons*, 434 U. S. 575 (1978), where this Court held that jury trials were available in ADEA actions. The *Holliday* court interpreted *Pons* to indicate (17 FEP Cases at 1178):

* The 1978 ADEA Amendments alter the requirement of Section 7(d) that an aggrieved individual must file a notice of intent to sue with the Department of Labor. Instead, a complainant must file a charge of age discrimination with that agency according to the same time limits as were already in effect with respect to the filing of a notice of intent to sue. The Amendments are not applicable to this case.

> that "but for" specific exceptions contained in the ADEA, Congress "intended to incorporate fully [into the ADEA] the remedies and procedures of the [Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq.]." 46 LW at 4151.

The Third Circuit held that because the ADEA incorporates many of the enforcement mechanisms of the FLSA, as opposed to Title VII, Section 14(b) need not be interpreted in the same manner as Section 706(c).

However, in *Pons* this Court specifically recognized that the ADEA, as it was passed in 1967, "is something of a hybrid". 434 U. S. at 578. Indeed, by stating that the ADEA incorporates the FLSA enforcement mechanisms *"but for"* certain exceptions, this Court has indicated that there are portions of the ADEA not modelled after the FLSA. 434 U. S. at 582. There is no counterpart to Section 14(b) in the FLSA. There is therefore no basis to presume that the question of the relationship of the ADEA to state enforcement mechanisms was patterned after the FLSA. Instead, the identity of language between Section 706(c) and Section 14(b) leads to the inescapable conclusion that this particular provision of this "hybrid" Act was derived from Title VII and should be interpreted in the same fashion.*

Pons makes clear that Title VII and the ADEA do share the same general purposes. The Court stated (434 U. S. at 584):

> There are important similarities between the two statutes, to be sure, both in their aims—the elimination of discrimination from the work place—and in their substantive provisions.

This similarity in purpose, along with the identity of language between Title VII, which was passed in 1964, and the ADEA, which was passed in 1967, makes the doctrine of *in pari materia*

* It was for precisely this reason that the court in the recent decision of *Hadfield* v. *Mitre Corp.*, Civil Action No. 74-2946-S, 47 U. S. L. W. 2338 (D. Mass. 1978), explicitly rejected *Holliday* and the court below and held that Section 14(b) was modelled after Section 706(c) and should therefore be interpreted as a jurisdictional prerequisite.

applicable. Under this settled rule of statutory construction, where there is some uncertainty as to the proper interpretation of a later statutory provision, and both statutes share similar purposes and language, the later statutory provision is interpreted in the same manner as the former. *See Northcross* v. *Board of Education of the Memphis City Schools*, 412 U. S. 427, 428 (1973); *Sands on Statutory Construction* § 51.02 (4th ed. 1973). Applying that principle here, Section 14(b) should be interpreted in the same manner as Section 706(b).

C. The Language of Section 7(d) of the ADEA Supports the Position That the Requirements of Section 14(b) Are Mandatory.

Another important factor establishing the mandatory nature of Section 14(b) is its similarity to Section 7(d) of the ADEA, 29 U. S. C. § 626(d), which provides that *"[n]o civil action may be commenced* . . . until" an aggrieved individual has satisfied certain prerequisites with respect to filing with the Department of Labor. This language of Section 7(d) has repeatedly been construed to set forth a mandatory prerequisite to a civil suit under ADEA. *See, e.g., Hiscott* v. *General Electric Co.*, 521 F. 2d 632 (6th Cir. 1975); *Powell* v. *Southwestern Bell Telephone Co.*, 494 F. 2d 485 (5th Cir. 1974). There is no reason to interpret the similar language of Section 14(b) any differently.

Section 7(d) also provides that in states having laws prohibiting age discrimination and establishing authorities to enforce these laws, an aggrieved individual must file with the Department of Labor within 300 days of the alleged unlawful practice instead of within 180 days as is normally the case. The purpose of the extended filing period is to allow an individual additional time to pursue his state remedy fully and still be able to file in a timely fashion with the federal authorities. *See, e.g., Berry* v. *Crocker National Bank*, 13 FEP Cases 673, 681 (N. D. Cal. 1976); *Bertsch* v. *Ford Motor Co.*, 415 F. Supp. 619, 626 (E. D. Mich. 1976).

The policy of extending the filing period in states having authorities enforcing laws against age discrimination is patterned after identical provisions in Title VII. *See Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228 (8th Cir. 1975). This is, of course, another indication that the ADEA's provisions concerning the relationship between state and federal remedies were modelled after Title VII.

In *Gabriele*, the Sixth Circuit recognized that the terms of the ADEA extended filing period are not limited to individuals who file charges with state authorities, thus leading to the possibility of giving the extra 120 days to individuals who do not even file with the state. To avoid such an illogical result, the court held that the extended filing period applies only to individuals who actually utilize the state remedy, a judicial gloss appearing nowhere in Section 7(d) and unnecessary if the plain language of Section 14(b) is given proper effect. If Section 14(b) is properly interpreted as a mandatory requirement, no aggrieved individual will receive the benefit of the extended filing period unless he files in a timely fashion with the state agency since his failure to do so will bar him from maintaining a federal action.

In sum, the plain language of Section 14(b), and its similarity to Section 706(c) of Title VII and Section 7(d) of the ADEA, indicate clearly that filing with a state agency is a mandatory prerequisite to a civil suit. Construing Section 14(b) in any other manner not only ignores the clear meaning of the statute but also violates basic rules of statutory construction.

III. The Legislative History of the ADEA Establishes Filing with an Appropriate State Agency As a Mandatory Prerequisite to Civil Suit.

A. Congress' Desire to Encourage Expeditious Resolution of Age Discrimination Claims Without Formal Proceedings Supports the Construction That Section 14(b) Sets Forth a Mandatory Prerequisite.

The legislative history of the ADEA reveals that Congress desired an age discrimination law utilizing a format which would encourage the settling of age discrimination claims in the most expeditious fashion possible. The main reason for this concern was that the ADEA was designed to protect the rights "of older citizens to whom, by definition, relatively few productive years are left." 113 Cong. Rec. 7076 (1967) (remarks of Senator Javits).

The method chosen to accomplish this goal was primary reliance on informal persuasion and conciliation with litigation used only as a last resort. Thus, the 1967 House Report to the ADEA states:

> [Enforcement should] be initially and exhaustively directed through informal methods of conciliation, conference, and persuasion and formal methods applied only in the ultimate sense.

House Rep. No. 805, 90th Cong., 1st Sess., 2 U. S. Code Cong. & Admin. News 2213, 2218 (1967). Similarly, Senator Yarborough, the principal sponsor of the ADEA, stated during Congressional debate (113 Cong. Rec. 31253 (1967)):

> While the bill includes enforcement procedures which are adopted from the Fair Labor Standards Act, it is the hope of the sponsors of this legislation that such procedures will not be needed very often.

See also 113 Cong. Rec. 7076 (1967) (Remarks of Senator Javits) (ADEA lawsuits "may only be commenced after informal methods of conciliation have been exhausted.").

The federal courts have recognized that interpreting Section 14(b) to set forth a mandatory prerequisite to a civil suit under

the ADEA furthers this intent since the state agency will always be given a limited period of at least sixty days in which to resolve claims of age discrimination before an aggrieved individual can institute suit in federal court. As the Second Circuit Court of Appeals held in *Reich* v. *Dow Badische Co.*, 575 F. 2d 363, 369 (2d Cir. 1978):

> Deference to state procedures where they exist is fundamental to the ADEA structure.

The requirement that an individual file with a state agency does not unduly prolong the pendency of age discrimination claims. The aggrieved individual may file with the Department of Labor at the same time he files with the state agency. Under Section 7(d), the individual must wait at least sixty days after filing with the Department of Labor before instituting civil suit. The sixty day waiting period under Section 14(b) may thus run concurrently with the sixty day waiting period of Section 7(d).

In fact, by filing with the federal agency at the same time as the state agency, the possibility of resolving the dispute before the claim ripens into a federal lawsuit is further increased. This is because the Secretary of Labor may also attempt to resolve the claim during the sixty day waiting period. *See Rogers* v. *Exxon Research Engineering Co.*, 550 F. 2d 834, 841 (3d Cir. 1977), *cert. denied*, 434 U. S. 1022 (1978) ("[P]rivate lawsuits are secondary to administrative remedies and suits brought by the Secretary of Labor.").

The facts of this case demonstrate that interpreting Section 14(b) as a mandatory prerequisite will not prolong the resolution of an age discrimination claim. Respondent filed this suit on March 7, 1977, almost one year after he filed his notice of intent to sue on March 10, 1976. During this one year period, respondent could have filed with the Iowa Commission, allowed the sixty day waiting period to run, and still have commenced his suit in March 1977. Because he chose to ignore the Iowa Commission, we will never know whether the Commission could

have resolved his claim through the exercise of its conciliatory and adjudicatory powers, thus avoiding the necessity for this suit.

By granting each claimant the option of initiating proceedings with the state agency or proceeding directly in federal courts, Congress' concern with resolving age discrimination disputes quickly and informally is completely frustrated. Instead of maximizing the possibility of resolving age discrimination claims during the sixty day period after filing with the Secretary of Labor, respondent's construction of Section 14(b) would allow aggrieved individuals to ignore available administrative avenues, remain idle during the sixty day period, and then resort immediately to the federal district courts for what could turn into lengthy litigation.*

B. The Legislative History of Section 14(b) Indicates That It Was Patterned After Section 706(c) of Title VII and Should Be Interpreted Accordingly.

In discussing the legislative history of Section 14(b), it should initially be noted that none of the provisions regarding the requirement of seeking redress from administrative agencies were contained in the original bills. See S. 830, reprinted in *Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on S. 830 and S. 788*, 90th Cong., 1st Session, at 2-5 (1967); H. R. 4221, reprinted in *Hearings Before the Subcommittee on Labor of the House*

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* In *Gabriele*, the Court of Appeals for the Sixth Circuit noted that the ADEA is remedial legislation and its procedural requirements should therefore be liberally construed, citing the opinion of the Eighth Circuit Court of Appeals in *Moses* v. *Falstaff Brewing Co.*, 525 F. 2d 92 (8th Cir. 1975). *See* 573 F. 2d at 954. *Moses* did not even involve a question of the interpretation or application of Section 14(d). Further, Courts construing Title VII have made the same statement about the Civil Rights Act of 1964, *see, e.g., Sanchez* v. *Standard Brands, Inc.*, 432 F. 2d 455, 460-61 (5th Cir. 1970), but have nevertheless held that noncompliance with the requirements of Section 706(c), which is phrased identically to Section 14(b), bars an individual suit.

Committee on Education and Labor on H. R. 3651, H. R. 3768 and H. R. 4421, 90th Cong., 1st Session, at 1-5 (1967). Instead, these bills contained an enforcement mechanism similar to the procedure followed under the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*, including the establishment of a new agency empowered to conduct hearings, make findings, and seek enforcement in the courts of appeals. No individual civil actions were authorized by those bills.

During the hearings on these bills, concern was expressed about the lengthy, indefinite delays attendant to such a procedure. As a result, different procedures were suggested, including a provision governing the relationship between state and federal remedies that would be modelled after Title VII. For example, Andrew Biemiller, the legislative director of the AFL-CIO, commented (*Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 830 and S. 788*, 90th Cong., 1st Sess., at 102 (1967):

> Mr. Biemiller. We are frankly a little disturbed by the section in the bill that is now before you which is designed to negative Federal preemption in this field. I think it could lead to great confusion, because if I read it properly, you are virtually leaving the State laws unhampered in their respective jurisdictions.
>
> It would seem to me it would be a far more practical and preferable solution if you would take the pattern that was developed by Senator Dirksen and Senator Humphrey, working in concert, in connection with title VII of the Civil Rights Act of 1964 creating the Equal Employment Opportunities Commission. There, as I recall, when you have a State law that is substantially in agreement with the Federal law a matter of 60 days is given to the State fair employment agency to try to solve the problem.
>
> At the end of that time, if the matter is not resolved, the case is moved to the Federal agency. I think this would be preferable to trying to say that, where there is a State law, the State agency shall have full and complete jurisdiction.

Similarly, Edward Conway of the New York Commission on Human Rights observed (*Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on S. 830 and S. 788*, 90th Cong., 1st Sess., at 228 (1967)):

> It is of particular importance that careful attention be given to the Federal-State relationship which will arise from the enactment of Federal legislation in the field of human rights where existing state legislation has been administered successfuly over a period of years.
>
> This factor was taken into account by the Congress upon its consideration and enactment of the Civil Rights Act of 1964.
>
> The experience under those provisions would appear to confirm the need for avoiding any implications of preemption of the field under the Federal statute.
>
> This requires a clear and specific saving clause which will not only save the jurisdiction of the State agencies, but will avoid to the greatest extent possible the coming into being of unnecessary duplications of effort.

These statements were never disputed or debated. And, shortly thereafter, the bill was amended to include Section 14(b) in its present form which, as noted above, contains language virtually identical to Title VII. Given the comments at the Congressional hearings urging that ADEA state deferral policy follow Title VII and the subsequent similarity in language, the conclusion is inescapable that Congress intended to make state filing a mandatory prerequisite to suit under the ADEA just as it was under Title VII.

This legislative history also demonstrates the insignificance of the fact that Section 14(b) is not included as part of Section 7, which sets forth other prerequisites to ADEA suits, a factor relied upon by some courts in holding that compliance with Section 14(b) is not mandatory. Section 14(b) was proposed as an amendment to the Act after the other provisions, including Section 7, had been drafted and debated. Section 7 and Section 14(b) refer to each other, thus incorporating by reference the mandatory requirements contained therein.

In sum, the legislative history of Section 14(b) establishes that Congress intended to require claimants to comply with the provisions of this section before initiating a federal action.* The history discloses that Section 14(b) was intentionally modelled after Section 706(c), is phrased identically, and should therefore be applied in the same manner.

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* In an effort to support its conclusion that section 14(b) does not set forth a mandatory prerequisite, the Third Circuit Court of Appeals in *Holliday* relied upon congressional remarks made during consideration of the 1978 ADEA Amendments. *See* 17 FEP Cases at 1180-81. Reliance on these remarks as being probative of the legislative intent behind the ADEA is inappropriate. This Court has recently held that statements made by Congress in its consideration of the 1978 amendments are entitled to no weight in interpreting the 1967 Act. In *United Air Lines* v. *McMann,* 434 U. S. 192, 200 n.7 (1978), the Court held:

> Legislative observations 10 years after passage of the Act are in no sense part of the legislative history.

See also Teamsters v. *United States,* 431 U. S. 324, 354 n.39 (1977) ("The views of members of a later Congress, concerning different sections of Title VII, enacted after the litigation was commenced, are entitled to little if any weight.").

The Court's comments in *McMann* pertained to the ADEA's mandatory retirement provisions. This subject was under consideration for amendment in 1977. In this case, the remarks relied upon in *Gabriele* are directed at Section 14(b), for which no amendment was ever proposed. It would thus appear *a fortiori* that these remarks are entitled to no weight in discerning legislation intent behind Section 14(b).

The 1978 Amendments to the ADEA in no way deal with Section 14(b). Under well established principles of law, the conclusion is therefore inescapable that Congress must be presumed to have intended to leave existing precedent intact on the subject of state deferral. At the time Congress passed the 1978 Amendments, the only circuit courts which had issued opinions on this question had held that Section 14(b) sets forth a mandatory prerequisite to civil suit. See *Goger* v. *H. K. Porter Co.,* 492 F. 2d 13 (3d Cir. 1974); *Curry* v. *Continental Airlines,* 513 F. 2d 691 (9th Cir. 1975). Congress' failure to change Section 14(b) thus reflects an intention to leave this precedent intact.

CONCLUSION.

For the foregoing reasons, we respectfully request the Court to reverse the decision of the Eighth Circuit Court of Appeals and remand this case to the district court with directions to dismiss this lawsuit.

Respectfully submitted,

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FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-275

OSCAR MAYER & CO., ROBERT M. BOLZ, N.D. OTTENS, DONALD L. PAUL, PAUL F. GOULD,

Petitioners,

vs.

JOSEPH W. EVANS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-275

OSCAR MAYER & CO., ET AL.,

Petitioners,

vs.

JOSEPH W. EVANS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT, JOSEPH W. EVANS

OPINIONS BELOW

The Opinion of the Eighth Circuit Court of Appeals on Rehearing (Cert. Pet. App. A15-A21), affirming the District Court, issued on July 6, 1978, is reported at 580 F.2d 298. The Opinion of the District Court for the Southern District of Iowa of July 8, 1977, denying Petitioners' Motion to Dismiss, is unofficially reported at 17 FEP Cases 218, and is reproduced in the Appendix to the Petition for a Writ of Certiorari (Cert. Pet. App. A1-A7).

JURISDICTION

The opinion of the Eighth Circuit Court of Appeals on Rehearing was entered on July 6, 1978 (Cert. Pet. App. A15-A21), and a Petition for Rehearing *En Banc* was denied on July 7, 1978 (Cert. Pet. App. A22). The Petition for a Writ of Certiorari was filed on August 18, 1978, and was granted by the Court on October 30, 1978. The jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves the interpretation and application of Section 14(b) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §633(b) (hereinafter referred to as the "ADEA"). Section 14 of the ADEA, in relevant part, provides:

FEDERAL-STATE RELATIONSHIP

> (a) Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of an action under this Act such action shall supersede any State action.
>
> (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated . . .

Also relevant is Section 706(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(c), which

is set forth in full in the Appendix (App. 9).[1]

QUESTION PRESENTED

In states having laws prohibiting age discrimination in employment and establishing agencies to grant or seek relief from such discriminatory practices, does Section 14(b) of the ADEA create a mandatory prerequisite of resort to state proceedings prior to filing a civil suit in Federal District Court under the ADEA?

STATEMENT OF THE CASE

Respondent Evans ("Evans") was employed by Petitioner Oscar Mayer & Co. ("Oscar Mayer"), as a hog buyer for 23 years at Oscar Mayer's Davenport, Iowa, plant until his retirement on January 31, 1976. (App. 4.)

On March 10, 1976, pursuant to Section 7(b) of the ADEA, 29 U.S.C. §626(b), Evans filed a timely notice of his intention to sue Oscar Mayer under the ADEA with the United States Department of Labor, claiming that he had been forced into early retirement under threat of discharge by Oscar Mayer. (App. 4,5.) The U.S. Department of Labor was unable to resolve the claim. (App. 5.) Thus, on March 7, 1977, Evans brought this ADEA action in the United States District Court for the Southern District of Iowa, Davenport Division, alleging that his forced retirement at Oscar Mayer on January 31, 1976 constituted age discrimination prohibited by the ADEA. (App. 1-6.)

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[1] Since the initiation of this lawsuit, the ADEA has been amended by the 1978 Amendments to the Age Discrimination in Employment Act, Pub. L. 95-256, 92 Stat. 189. The Amendments are not relevant to the questions raised in this case.

Oscar Mayer moved to dismiss the complaint for lack of jurisdiction over the subject matter, alleging that Section 14(b) of the ADEA required Evans to file a timely complaint of age discrimination with the Iowa Civil Rights Commission. (App. 7.) Evans has conceded in this case that he has made no resort to the Iowa Civil Rights Commission. On August 8, 1977, the Motion to Dismiss was denied by the District Court, which held that "such resort is not a mandatory nor jurisdictional prerequisite to the filing of an ADEA in federal court". (Cert. Pet. App. A6.)

On April 5, 1978, a divided panel of the Court of Appeals for the Eighth Circuit reversed the decision of the District Court and held that resort to the state agency was a procedural prerequisite to a lawsuit under the ADEA. However, the majority observed that a "definitive answer cannot be found in either the language of the statute, its legislative history, or the policy behind it", and that ". . . substantial support can be found for either conclusion". (Cert. Pet. App. A10.)

Evans filed a petition for rehearing and suggestions for rehearing *en banc*. The Secretary of Labor, on April 26, 1978, was permitted to file an *amicus curiae* brief in support of the optional nature of Section 14(b) urged by Evans. On July 6, 1978, the same panel of the Court of Appeals granted the petition for rehearing, withdrew its former opinion, and affirmed the District Court's order that Section 14(b) did not create a mandatory prerequisite to the filing of a suit under the ADEA. The Court held that "such an individual has the option of proceeding first before the state agency and then in the federal court or proceeding initially in the federal court without prior resort to the state agency". (Cert. Pet. App. A19.)

SUMMARY OF ARGUMENT

The plain language of Section 14(b) does not impose a mandatory prerequisite requiring prior resort to state proceedings before filing a civil suit in federal court under the ADEA. The strength of the Petitioners' argument rests largely upon the analogy between Title VII of the Civil Rights Act of 1964, specifically Section 706(c), and Section 14(b) of the ADEA. However, Evans believes that this analogy is seriously misplaced. Further, Evans' interpretation is supported by the significant difference in language between these two sections, the establishment of concurrent state and federal jurisdiction under the ADEA, the fact that Section 14(a) of the ADEA mandates federal action to supersede all state proceedings, and the relationship between Section 7 and Section 14 of the ADEA.

The legislative history of the ADEA is not instructive on the proper interpretation to be given Section 14(b). However, the legislative history of the 1978 Amendments to the ADEA provide extrinsic support for the position urged by Evans.

Interpretation of Section 14(b) urged by Evans is consistent with the notion that the ADEA is remedial and humanitarian legislation which should be liberally interpreted to effectuate the Congressional purpose of ending age discrimination in employment. Further, if not construed in this manner, the ADEA's purpose would be frustrated rather than fulfilled by the creation of a procedural requirement which in many instances would prevent an otherwise meritorious age claim from being considered.

Finally, prior resort to state proceedings is, in any event, not jurisdictional. Therefore, noncompliance with Section 14(b) may be allowed for equitable considerations, and those considerations apply to this case.

ARGUMENT

I

SECTION 14(b) OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT DOES NOT REQUIRE AN AGGRIEVED INDIVIDUAL TO RESORT TO PROCEEDINGS UNDER STATE LAW PRIOR TO THE FILING OF A FEDERAL ACTION UNDER THE ADEA.

A. Introduction

The Age Discrimination in Employment Act was enacted in 1967 for the express purpose of promoting "employment of older persons based on their ability rather than age" and prohibiting "arbitrary age discrimination".[2] The Act makes it unlawful for employers, employment agencies and labor organizations to discriminate on the basis of age, the protected group being, at the time of the initiation of this action, those persons between the ages of 40 and 65.[3]

The sole issue before the Court involves the interpretation and application of Section 14(b) of the ADEA. Section 14(b) provides that:

> "In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated."

[2]29 U.S.C. §621(b).

[3]29 U.S.C. §631. Subsequent to the filing of this action, the upper age limit was amended to 70 years of age by the Amendments to the Age Discrimination in Employment Act, Pub. L. No. 95-256, 92 Stat. 189. The amendments are not relevant to the questions raised in this case.

Evans urges that Section 14(b) does not create a mandatory prerequisite requiring resort to state proceedings prior to the initiation of a suit under the ADEA. Rather, Evans believes that the purpose of Section 14(b) is merely to give the state time to act if the aggrieved individual chooses to employ state proceedings and remedies prior to initiation of Federal suit. Oscar Mayer, on the other hand, contends that Section 14(b) is a mandatory prerequisite to the institution of a Federal action under the ADEA, and thus, in states having laws prohibiting age discrimination in employment and establishing authorities to enforce these laws, aggrieved individuals must file a timely charge of age discrimination with these state authorities.[4]

Five Courts of Appeals, four of them within the preceding year, have considered this issue. The Eighth Circuit, in their opinion below, held that prior resort to state proceedings is not a procedural prerequisite to a Federal suit under the ADEA. 580 F.2d 298 (Cert. Pet. App. A15-A21). The Third Circuit reached the same conclusion in its unanimous *en banc* decision in *Holliday v. Ketchum, MacLeod & Grove, Inc.*, ___ F.2d ___, 17 FEP Cases 1175 (3d Cir. 1973), reversing its earlier decision of *Goger v. H.K. Porter Co.*, 492

[4]However, both parties agree that an aggrieved individual who does apply initially to the state for relief must then wait at least sixty days before instituting an action under the ADEA in Federal Court.

F.2d 13 (3d Cir. 1974).[5] The Sixth Circuit reached the same conclusion as the Eighth and Third Circuits in *Gabriele v. Chrysler Corp.*, 573 F.2d 949 (6th Cir. 1978), petition for *cert.* pending (No. 78-1).[6]

The Second Circuit has reached a contrary result in *Reich v. Dow Badische Co.*, 575 F.2d 363 (2d Cir. 1978), petition for *cert.* denied (No. 78-5568), December 4, 1978), as did the Ninth Circuit in *Curry v. Continental Airlines*, 513 F.2d 691 (9th Cir. 1975), in dictum.

For the reasons set forth below, Evans submits that his interpretation of Section 14(b), which provides an aggrieved individual with the option of pursuing state remedies or proceeding directly to Federal Court and instituting an action under the ADEA, is consistent with the clear and plain language of the ADEA, the Congressional intent and concern behind the ADEA to eliminate the delays occasioned by administrative proceedings, and the remedial nature of this legislation.

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[5]This is also the position taken by the Secretary of Labor, who is charged with enforcement responsibility under the ADEA. The Secretary of Labor filed an *amicus curiae* brief below in support of Evans' petition for rehearing. The Third Circuit, in *Holliday*, 17 FEP Cases at 1180, found "it significant that the Secretary has urged that the ADEA affords complainants a choice of forum"; accord: *Goger*, 492 F.2d at 18 (concurring opinion). Additionally, "[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

[6]The Third Circuit has followed its decision in *Holliday* in *Smith v. Jos. Schlitz Brewing Co.*, ___ F.2d ___, 17 FEP Cases 1188, petition for *cert.* pending (No. 78-419); and the Sixth Circuit has followed its decision in *Gabriele* in *Simpson v. Whirlpool Corp.*, 537 F.2d 957, petition for *cert.* pending (No. 78-53).

Oscar Mayer's position that Section 14(b) requires mandatory resort to state proceedings prior to filing an action under the ADEA, creates a procedural obstacle and pitfall for unsuspecting individuals which deprives many aggrieved individuals with meritorious claims of their day in court. As a result, the objective of this remedial legislation, which is to promote the employment of older workers based on their ability rather than their age, would be thwarted.

B. The Plain Language Of Section 14(b) Establishes That No Initial Resort To State Proceedings Is Required.

Nowhere in the plain language of Section 14(b) is a mandatory prerequisite established. It states:

> "In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age in establishing or authorizing a State authority to grant or seek relief from such discriminatory practices, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. . . ."

Although the interpretation urged by Oscar Mayer of Section 14(b) would require aggrieved individuals to resort to state administrative proceedings, the plain and express terms of Section 14(b) certainly impose no such requirement. Rather, the language "carefully avoids what would have been a simple statement of an exhaustion requirement" if that were intended. *Smith*

v. Jos. Schlitz Brewing Co., 419 F.Supp. 770, 774 (D. N.J. 1976), accord: *Bertrand v. Orkin Exterminating Co.*, 419 F.Supp. 1123, 1126 (N.D. Ill. 1976); *Vasquez v. Eastern Air Lines, Inc.*, 405 F.Supp. 1353, 1356 (D. P.R. 1975); *Goger v. H.K. Porter Co.*, 492 F.2d 13, 17-18 (3d Cir. 1974) (Judge Garth concurring).

This plain language of Section 14(b) recently led the Third Circuit Court of Appeals, consistent with the majority opinion of the court below, to conclude that Section 14(b) does not set forth a mandatory prerequisite to civil suit under the ADEA. In *Holliday*, 17 FEP Cases at 1179, the Third Circuit held, regarding the plain language of Section 14(b):

> "The language of the ADEA itself strongly supports our conclusion that no initial resort to state age discrimination remedies is required. The statute nowhere explicitly imposes a resort to state proceedings as a precondition to instituting federal suit."

This is entirely consistent with the construction given Section 14(b) by the trial court in this matter, which held that Section 14(b):

> ". . . does not expressly command the commencement of proceedings under state law. . . . This section is entirely consistent with the interpretation that only when resort has been made to a state agency is the sixty day waiting period mandatory. . . . It does not mandate initial filing with the state agency." (Cert. Pet. App. A2-A3.)[7]

Therefore, the plan language of Section 14(b) is entirely consistent and supportive of Evans' position that this section allows an aggrieved individual the

[7]Accord: *Vasquez v. Eastern Air Lines, Inc.*, 405 F.Supp. 1353, 1356 (D. P.R. 1975).

choice of initial state proceedings or the filing of an ADEA action in federal district court.

C. The Interpretation Of Section 14(b) Urged By Petitioners Is Contingent Upon The Analogy Of Section 14(b) Of The ADEA To Section 706(c) Of Title VII. However, This Analogy Is Misplaced. Compelling Reasons Exist For Construing Section 14(b) Differently Than Section 706(c).

1. The Misplaced Title VII Analogy.

Throughout the entire course of litigation in this case, Oscar Mayer has consistently and unsuccessfully attempted to analogize Section 14(b) of the ADEA to the somewhat similar language appearing in Section 706(c) of Title VII of the Civil Rights Act of 1964.[8] Although the language of the two sections appear to be similar in nature, there are compelling reasons, set forth below, that mandate a different construction for Section 14(b) of the ADEA. Although courts have "recognized the parallels between the ADEA and Title VII of the Civil Rights Act of 1964", they have been careful to caution ". . . against blindly applying Title VII reasoning and results to ADEA cases". *Gabriele v. Chrysler Corp.*, 573 F.2d 949, 953 (6th Cir. 1978). Unquestionably, both Title VII and the ADEA are aimed at eliminating discrimination in the workplace; however, the ADEA "is embodied in a separate act and has its own unique history . . ." *Laugesen v. Anaconda Company*, 510 F.2d 307, 312 (6th Cir. 1975). This would seem to indicate, as the trial court held below,

[8]42 U.S.C. §2000e-5(c).

"that automatic adoption of Title VII guidelines would be inappropriate". (Cert. Pet. App. A4.) Therefore, it does not follow, as Oscar Mayer contends, that because the courts have held that an individual must resort to appropriate state proceedings before suit may be filed under Title VII,[9] that this construction of Title VII must be automatically and mechanically carried over to the ADEA.

This rejection of the Title VII analogy prompted the United States Court of Appeals for the Third Circuit in *Holliday*, 17 FEP Cases at 1178, to observe:

> "As we have previously noted, the majority opinion in *Goger* reached its conclusion through an almost exclusive reliance on an analogy between procedures prescribed under Title VII and those applicable under the ADEA. We now know however that such reliance was unwarranted. . . . The critical premise supporting the majority opinion's reasoning in *Goger* having been undercut by the Supreme Court's interpretation of the ADEA, the *Goger* conclusion that prior resort is necessary must also fall.
>
> In sum, *Lorillard* compels us to disavow the *Goger* majority's reliance on an analogy to Title VII procedure—a reliance which it now appears was 'misplaced'. 46 L.W. at 4152, 16 FEP Cases at 888." (Footnotes omitted.)

In *Lorillard v. Pons*, 434 U.S. 575, 582 (1978), this Court observed that the "selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to

[9] *Love v. Pullman Co.*, 404 U.S. 522 (1972); *Olson v. Rembrandt Printing Co.*, 511 F.2d 1288 (8th Cir. 1975); *DuBois v. Packard Bell Corp.*, 420 F.2d 973 (10th Cir. 1972).

incorporate fully the remedies and procedures of the FLSA". Thus, although the ADEA reflects the substantive provisions of Title VII, it incorporates, but for express changes, the procedures of the FLSA. As *Holliday*, 17 FEP Cases at 1178, points out, the FLSA "does not require any, let alone prior, resort to state proceedings in order to redress FLSA violations. 29 U.S.C. §§216-217."

Thus, although there is no express counterpart to Section 14(b) in the FLSA, as Oscar Mayer correctly points out,[10] Evans' position is entirely consistent with the expressed procedural requirements of the FLSA, which does not require any prior resort to the filing of a federal suit. To this extent, Petitioners' reliance on Title VII appears misplaced.

2. The Language Of Section 14(b) Is Not The Mirror-image Of Section 706(c) Of Title VII: Unlike Title VII, Section 14(b) Of The ADEA Establishes Concurrent Jurisdiction.

Although Oscar Mayer characterizes the wording of Section 14(b) of the ADEA and Section 706(c) of Title VII as identical, in fact, an important distinction exists between the language of these two acts. The United States Court of Appeals for the Third Circuit, in *Holliday*, 17 FEP Cases at 1179, recognized the important distinction in language between Section 14(b) of the ADEA and Section 706(c) of Title VII when it held:

[10] Brief for Petitioners, at 16.

"The latter states that 'no charge may be filed' until after the sixty day waiting period. This prevents all Federal action during the waiting period, since filing of a charge with the EEOC is a prerequisite to a Title VII suit in Federal Court. The sixty-day period gives the appropriate state agency two months of exclusive jurisdiction over the discrimination allegation. Section 633(b), on the other hand, says 'no suit may be brought' until after the sixty-day waiting period. This only prohibits the filing of a complaint in the district court and contemplates possible concurrent administrative action by the state agency and the Department of Labor. *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 194, n.8 (3d Cir. 1977). The absence of a period of exclusive state jurisdiction under the ADEA is thus another indicia of lesser deference to the states under the ADEA than under Title VII. Again, this militates in favor of not requiring prior resort to a state agency before an ADEA suit in Federal Court. *Gabriele v. Chrysler Corp.*, 573 F.2d at 954, 17 FEP Cases at 203."[11]

The effect of this distinction in the statutory language between the two sections of these acts is that Title VII provides for consecutive state and federal administrative proceedings, while Section 14(b) permits concurrent federal and state administrative proceedings. Under Title VII, Section 706(c) provides that "no charge may be filed" with the EEOC until after the state has been afforded its minimum sixty-day period. Thus, during this period, all federal action is precluded, since the filing of a charge is a mandatory prerequisite

[11]Accord: Note, *Procedural Prerequisites to Private Suit Under the Age Discrimination in Employment Act*, 44 U. Chi. L. Rev. 457, 475-80 (1977).

to any further administrative action by the EEOC and to a Title VII federal suit. Thus, under a Title VII action, Section 706(c) mandates a minimum two month period of exclusive jurisdiction by the state agency. The clear import of this distinction is that state proceedings are given less deference under the ADEA than under Title VII by establishing concurrent state and federal jurisdiction under the ADEA.

3. Section 14(a) Of The ADEA, Unlike Title VII, Mandates That Initiation Of Federal Action Supersedes All State Proceedings.

Section 14(a) of the ADEA,[12] for which Title VII has no counterpart, provides that upon commencement of an action under the ADEA, all state proceedings are superseded. Thus, even under Oscar Mayer's view of this action, Evans could have totally cut off any administrative action by the Iowa Civil Rights Commission simply by waiting sixty days and beginning this Federal Court action.

This ability of an aggrieved individual to supersede all pending state proceedings by filing a Federal Court action a scant sixty days after the notification to state authorities, prompted the Third Circuit, in *Holliday*, 17 FEP Cases at 1179, to comment:

> "It would indeed be incongruous to attribute an intent to Congress to mandate resort to state proceedings when those proceedings need not be concluded, and would in any event be necessarily superseded by the filing of a federal suit."[13]

[12]29 U.S.C. §633(a).

[13]Accord, *Gabriele v. Chrysler Corp.*, 573 F.2d 949, 954 (6th Cir. 1979); *Bertrand v. Orkin Exterminating Co., Inc.*, 419 F.Supp. 1123, 1127 (N.D. Ill. 1976); *Vasquez v. Eastern Air Lines, Inc.*, 405 F.Supp. 1353, 1356 (D. P.R. 1975).

Thus, both the *Gabriele* and *Holliday* courts concluded that the ADEA exhibits lesser deference to the states than does Title VII, and lends credence to the view that resort to state proceedings is not a prerequisite to an ADEA suit. *Gabriele*, 573 F.2d at 954; *Holliday*, 17 FEP Cases at 1179.

This construction is entirely consistent with Evans' interpretation that Section 14(b) presents the aggrieved individual with an option to proceed first with state proceedings. Assuming that an aggrieved individual does first seek the state's aid, he (or the Secretary of Labor) may file suit in Federal Court a scant sixty days later, thus superseding any state proceedings. The shortness of this modest grace period renders the ability of state proceedings to process a complaint to conclusion, including the possibility of litigation, extremely suspect. Rather, if an individual is genuinely and seriously interested in seeking and pursuing state proceedings, as would presumably be the case if the individual invoked state proceedings initially by choice, he may allow the state proceedings to work their course for up to two, or in the case of a willful violation, three years, before filing the suit in Federal Court.[14]

D. The Relationship Between Section 7 And Section 14 Of The ADEA Supports The Position That The Requirements Of Section 14(b) Are Optional.

Section 706 of Title VII sets forth the procedural steps and timetables which an aggrieved person must follow before filing suit to enforce rights protected

[14]29 U.S.C. §626(e)(1), incorporating by reference the statute of limitations in 29 U.S.C. §255(a).

under that act. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973). "The comparable provision in the ADEA is Section 7, not Section 14, since it is Section 7 which sets forth the jurisdictional prerequisites for filing suit." *Vasquez v. Eastern Airlines, Inc.*, 405 F.Supp. 1353, 1355 (D. P.R. 1975). In contrast, *Vasquez*, at 1355, states that "Section 14 of the ADEA does not set forth any jurisdictional steps for instituting suit, but deals solely with the relationship between Federal and State laws."

Thus, the procedural prerequisites for a suit under the ADEA are found in Section 7 of the Act, which provisions bear the express label of "jurisdiction" in the United States Code, and are the more likely analogue to Section 706 of Title VII. Therefore, in Title VII, the jurisdictional notice requirements appear in the same section as the language dealing with deference to state law remedies. However, under the ADEA, the reference to state law deference, Section 14(b), is isolated from the other procedural prerequisites and is part of a section entitled "Federal State Relationship" and is captioned "Limitation on Federal Action upon Commencement of State Proceedings". Several courts have noted this distinction and have relied upon it in holding that Section 14(b) is optional and that ". . . Congressional concern" regarding Section 14 of the ADEA ". . . was restricted to notions of comity and federalism, not to jurisdictional prerequisites". *Holliday*, 17 FEP Cases at 1180; *Bertrand v. Orkin Exterminating Co., Inc.*, 419 F.Supp. 1123, 1126 (N.D. Ill. 1976); *Vasquez v. Eastern Airlines, Inc.*, 405 F.Supp. 1353, 1356 (D. P.R. 1975).

Oscar Mayer argues that the extended filing period provided in Section 7(b) of the ADEA, giving addition-

al time to file with the Department of Labor in cases where individuals are pursuing state remedies, is somehow inconsistent with the interpretation of Section 14(b) of the ADEA offered by Evans.[15] On the contrary, as *Gabriele*, 573 F.2d at 955, points out: "One obtains the benefits of the extended filing period in §626(b)(2) *only* if he is in a 'deferral state' *and* elects to use the state's mechanisms to attempt a conciliation of the grievance." Obviously, it is only when an aggrieved individual elects to use more "time to let the state try its hand that he needs more time to notify the Secretary of Labor". *Gabriele, ibid.* Thus, the language of Section 7(b) of the ADEA is entirely consistent with the position taken by Evans that Section 14(b) is optional.

E. The Legislative History Of The ADEA Is Not Instructive On The Proper Interpretation To Be Given Section 14(b); However, The Legislative History Of The 1978 Amendments To The ADEA Provide Extrinsic Support For Respondent's Position.

1. The Legislative History Of The ADEA Is Not Instructive On The Proper Interpretation To Be Given Section 14(b).

Unlike Section 706(c) of Title VII, where Congress clearly expressed its intent to require prior resort to state proceedings,[16] the "legislative history of the

[15]Petitioners' Brief, at 17-18.

[16]Statements of Senator Humphrey, 110 Cong. Rec. 12721 (1964), reproduced at 12 of Petitioners' Brief; *DuBois v. Packard Bell Corp.*, 470 F.2d 973, 975 (10th Cir. 1972), where the Court noted that "if the legislative history of Title VII were not so manifestly clear to remove all doubt, the liberal interpretation accorded remedial legislation of this type might have some room for argument . . ."

ADEA is . . . devoid of any indication that Congress intended to restrict an individual's right to file suit under the Federal law to cases in which proceedings had first been commenced under State law . . ." *Vasquez*, 405 F.Supp. at 1357. In *Gabriele*, 573 F.2d at 953, the Sixth Circuit also recognized, after reviewing the sparse legislative history surrounding Section 14(b), the "absence of the kind of clear legislative history supporting the construction generally given" Section 706(c) of Title VII.[17] In *Holliday*, 17 FEP Cases at n.33,1180, the Sixth Circuit also noted, after their independent review of the legislative history surrounding the 1967 enactment of Section 14(b), that there exists "no support for the proposition that initial resort to state remedies is required". Thus, the legislative history of Section 14(b) of the ADEA is not instructive

[17]Interestingly, two district courts found a general Congressional intent supporting Evans' position. Judge Decker found that "Congress evidently was concerned about the impact of bureaucratic delay imposed by the establishment of an additional administrative impediment to adjudication of grievances". *Bertrand*, 419 F.Supp. at 1126. Judge Pesquera perceived a "Congressional concern to eliminate the delays occasioned by administrative proceedings which other discriminatees had encountered in bringing their cases to court under Title VII". *Vasquez*, 405 F.Supp. at 1356.

Senator Javits also expressed his concern about administrative delay when he stated: "Such delay is always unfortunate, but is particularly so in the case of older citizens to whom, by definition, relatively few productive years are left. By utilizing the courts rather than a bureaucracy within the Labor Department as the forum to hear cases arising under the law, these delays may be largely avoided." Statements by Senator Javits, Hearings Before the Subcommittee on Labor, United States Senate, 113 Cong. Rec. 7076, 90th Cong. 1st Sess. (1967).

of its proper interpretation.[18]

2. The Legislative History Of The 1978 Amendments To The ADEA Provide Extrinsic Support For Respondent's Position.

Congress has recently engaged in a comprehensive review of the provisions of the ADEA. The results of this review, the Age Discrimination in Employment Act Amendments of 1978 (Pub. L. 95-256, 92 Stat. 189), were signed into law on April 6, 1978. In the course of Congress' careful study and deliberations of the ADEA, Congress made it explicit that its intended interpretation of Section 14(b) is precisely the same as

[18]The Petitioners, in support of their argument that the legislative history of the ADEA supports their interpretation of Section 14(b), rely on the testimony of two witnesses who appeared before the Senate Subcommittee on Labor. Mr. Biemiller, the legislative director of the AFL-CIO, was not concerned about requiring individuals to resort to state proceedings, but, rather, about "leaving the State laws unhampered in their respective jurisdictions". (Pet. Brief, at 22.) His concern was thus with the possibility of a lack of federal preemption. This was resolved by the passage of Section 14 of the ADEA, and Mr. Biemiller's concerns are fully accomplished by the interpretation of Section 14(b) urged by Evans.

Mr. Conway, of the New York Commission on Human Rights, on the other hand, was concerned with "avoiding any implication of preemption". (Pet. Brief, at 23.) His concern was accommodated by the fact that state proceedings, when optionally engaged in by the aggrieved individuals, are preempted only by the filing of a federal action under the ADEA, pursuant to Section 14(a). Thus, the statements by these individuals in no way support Petitioners' argument. In any event, the "individual opinions of witnesses at hearings are of dubious value in interpretation of legislation". *March v. U.S.*, 506 F.2d 1306, 1314 n.30 (D.C. Cir. 1974).

that urged by Evans and adopted by the Eighth Circuit Court of Appeals below in this case. Regarding these findings, the Court, in *Holliday*, 17 FEP Cases at 1180, stated, "It is a rare and welcome event to discover legislative history so unambiguous".

The joint conference report accompanying the 1978 ADEA Amendments adopted the Senate report's discussion of Section 14(b). The Senate report states, in relevant part:

> "Section 14(b) of the Act . . . requires that *if* the individual chooses to apply first to the State agency for relief he must give the State the prescribed minimum period in which to take remedial action before he may turn to federal courts for relief under the ADEA. *The provision does not require that the individual go to the State first in every instance.*
>
> Several courts have properly recognized this distinction . . .
>
> Other courts, however, have ruled that the complainant must go initially to the State authorities in every instance, and that failure to do so requires dismissal of the federal action . . .
>
> *It is the committee's view that an individual who has been discriminated against because of age is free to proceed either under state law or under federal law. The choice is up to the individual.* However, as Section 14(b) makes clear, if the individual does choose to proceed initially under State law, he must give the State agency at least 60 days to take remedial action before he may commence a federal action."

S. Rep. No. 493, 95th Cong., 1st Sess. 6-7 (emphasis added), reprinted in [1978] U.S. Code Cong. & Ad. News 976, 981-82, adopted in "Joint Explanatory

Statement of the Committee of Conference," H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess., 7, 12, reprinted in [1978] U.S. Code Cong. & Ad. News 1000, 1006.[19]

With regard to this legislative history, the Court, in *Holliday*, 17 FEP Cases at 1180, stated: "An interpretation of the ADEA which was feasible, if not preferable, before 1978 has now been officially ratified by the joint congressional committee assigned to study and recommend changes in the statute".

The Court, in *Holliday, ibid.*, was also concerned about the "problematic . . . impact of a 1978 joint committee report on our interpretation of a 1967 enactment. Certainly the intent of the 1978 amenders of the ADEA cannot be said to represent or reflect the intent of the 1977 Congress . . ."

The Court, in *Holliday*, 17 FEP Cases 1180, 1181, recognized "as did the Supreme Court, that although the views of a subsequent Congress 'provide no controlling basis' for inferring original Congressional intent, '[n]onetheless it is pertinent to note [the views of a subsequent congressional committee] . . . reporting

[19]The Joint Explanatory Statement of the Committee of Conference, in pertinent part, states as follows:

CONFERENCE AGREEMENT

> The House recedes with an amendment retaining the 180-day and 300-day time limitations in section 7(d), but requiring that a "charge" rather than a "notice of intent to sue" be filed with the Secretary of Labor within this period. *The 300-day limitation and related State deferral procedures are described in more detail in Senate Report 95-493 at pages 5 to 7. The conferees adopt this discussion in the Senate report.* (Emphasis added.)

. . . on certain proposed amendments to the Act.' *Haynes v. United States*, 390 U.S. 85, 87-88 n.4 (1968) . . . The views of a joint congressional committee are entitled to consideration and weight in our re-examination of the contours of" Section 14(b) of the ADEA.[20]

Inasmuch as the legislative history surrounding the 1967 enactment of the ADEA is not instructive on the proper interpretation of Section 14(b), there is no reason why the explicit and unambiguous interpretation of the 1978 Congress should not be persuasive. This is especially true because "the ADEA is remedial and humanitarian legislation which should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment." *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 193 (3d Cir. 1977), *cert.* denied (No. 77-1562, October 2, 1978).[21]

As this Court has stated in the Title VII context, because of the remedial nature of this kind of legislation, it "will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts". *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-799 (1973).

In sum, the plain language of Section 14(b), the misplaced Title VII analogy, the establishment of

[20]In a similar context, a noted commentator on statutory construction has stated, "Although comments about an earlier act in a legislative committee report on a subsequent bill are not part of the legislative history of the earlier act and therefore have less probative force in legislative history, they are entitled to consideration as an expert opinion concerning its proper interpretation." *Sands On Statutory Construction*, §49.11 (4th ed. 1973).

[21]Accord: *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92, 93 (8th Cir. 1975); *Gabriele*, 573 F.2d at 954; *Holliday*, 17 FEP Cases at 1181.

concurrent jurisdiction, the superseding of all state proceedings, the relationship between Section 7 and Section 14 of the ADEA, and its legislative history and remedial nature, mandate the conclusion that Section 14(b) does not require prior resort to state proceedings before initiation of a federal action under the ADEA.

II

PRIOR RESORT TO STATE PROCEEDINGS IS IN ANY EVENT NOT JURISDICTIONAL; NONCOMPLIANCE WITH SECTION 14(b) OF THE ADEA MAY BE ALLOWED FOR EQUITABLE CONSIDERATIONS.

Assuming, *arguendo*, that this Court holds that Section 14(b) creates a mandatory prerequisite to the institution of federal court action under the ADEA, Joseph Evans requests that the Court incorporate and adopt the doctrine of equitable modification, utilized by lower federal courts in ADEA cases, so that he and other future litigants under the ADEA do not automatically succumb to ". . . a procedural pitfall for unsuspecting individuals which could easily serve, . . . to deprive aggrieved individuals of their day in court, thereby thwarting the objective of this remedial legislation". *Vasquez v. Eastern Airlines, Inc.*, 405 F.Supp. 1353, 1357 (D. P.R. 1975).

The doctrine of equitable modification has been utilized by the lower federal courts in situations where plaintiffs have failed to meet the requirements of Section 14(b), but nonetheless have been ". . . granted relief against noncompliance where circumstances

have been presented that indicate that the interests of justice require that equitable relief". *Reich v. Dow Badische Co.*, 575 F.2d 363 370 (2d Cir. 1978).

Several lower federal court decisions holding that Section 14(b) is a mandatory prerequisite to institution of federal court action under the ADEA apply the principles of equitable modification, and thus allow plaintiffs an opportunity to proceed to the merits of their federal age discrimination claims under the ADEA, despite their noncompliance with Section 14(b), when necessary to effect the broad remedial purpose of the statute. *Reich v. Dow Badische Co.*, 575 F.2d 363, 370 (2d Cir. 1978); *Arnold v. Hawaiian Telephone Co.*, 12 FEP Cases 400 (D. Hawaii 1975); *Goger v. H.K. Porter Co.*, 492 F.2d 13 (3d Cir. 1974); *Vaughn v. Chrysler Corp.*, 382 F.Supp. 143 (E.D. Mich. 1974); *Rodgers v. Exxon Research Engineering Co.*, 550 F.2d 834, 844, *cert.* denied, ___ U.S. ___, 98 S.Ct. 749 (January 9, 1978); *Sutherland v. S.K.F. Industries, Inc.*, 419 F.Supp. 610, 613-614 (E.D. Tenn. 1976).

Judge Bright, of the United States Court of Appeals for the Eighth Circuit, dissenting in the opinion on rehearing in this case, recognized the need for utilizing equitable modification in the appropriate case, including this one, when he stated:

> ". . . I would not dismiss the action outright, even though Evans failed to file a charge with the state agency. That requirement is not 'jurisdictional'; it is a procedural requirement, which may be subject to equitable modification when necessary to reflect the broad remedial purposes of the statute. A similar principle has been applied in interpreting various procedural requirements under Title VII

(citations omitted), and I feel it should apply in the present case." (Cert. Pet. App. A15, A21.)

Joseph Evans, in his Resistance to Oscar Mayer's Motion to Dismiss, argues that he had relied on official advice from the Department of Labor that the only requirement under the ADEA was notice to the Secretary of Labor. Moreover, Evans had no interpretation of Section 14(b) by the United States Court of Appeals for the Eighth Circuit to guide him. See, *Goger v. H.K. Porter Co.*, 492 F.2d 13, 16-17 (3d Cir. 1974). In that the district court did not reach this question in disposing of Oscar Mayer's Motion to Dismiss, if this Court adopts the doctrine of equitable modification in Section 14(b) noncompliance situations, this Court should remand this case back to the United States District Court for the Southern District of Iowa for further proceedings on Oscar Mayer's Motion to Dismiss, to allow Joseph Evans an opportunity to present and prove his equitable modification claim.

CONCLUSION

For the foregoing reasons, we respectfully request the Court to affirm the decision of the Eighth Circuit Court of Appeals, and remand this case to the district court so that the Respondent may, at last, proceed to the merits of his claim.

Respectfully submitted,

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FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-275

OSCAR MAYER & CO., ET AL.,
Petitioners,

vs.

JOSEPH W. EVANS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS OSCAR MAYER & CO., ROBERT M. BOLZ, N. D. OTTENS, DONALD L. PAUL, PAUL F. GOULD.

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I.

Respondent and the Solicitor General each claim that a sixty day period of state deferral is too short to permit state authorities to play a meaningful role in resolving age discrimination claims and, therefore, it is illogical to construe filing with state authorities as mandatory (Resp. Br. 15-16; S. G. Br. 14-18).

Speculation about what each of the thirty-two local agencies enforcing laws against age discrimination may or may not be able to do in a sixty day period has no bearing on the question presented in this case.[1] What is important is that Congress

1. The Solicitor General concedes that "[s]ome complaints might be capable of resolution with 60 days", *e.g.*, "simple complaints or ones in which the alleged wrongdoer promptly admitted error" (S. G. Br. 17n.14). The Solicitor thus admits that construing Section 14(b) as a mandatory prerequisite will at a minimum keep these types of complaints out of the federal courts.

believed a minimum of sixty days to be an appropriate period of deferral. This period strikes a balance which allows states an opportunity to give meaningful consideration to the charge, yet it is short enough in duration so as to avoid undue delay in the processing of the claim.

Concern about the shortness of the sixty day period mistakenly assumes that a complainant must commence litigation as soon as the sixty day period has expired. This is simply not true. An individual needs only to commence his suit before the two year statute of limitations of the Age Discrimination in Employment Act ("ADEA") has run. 29 U. S. C. § 626(e)(1).[2] Thus, if the state makes a meaningful start on the resolution of a claim, the complainant can allow the state proceedings to run their course and wait long after the sixty day period has expired to commence litigation.

Significantly, this same state deferral period of sixty days is provided under Section 706(c) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5(c) (which is phrased identically to Section 14(b)), before federal proceedings may be instituted. Respondent and the Solicitor General concede that timely filing with state authorities and the passing of sixty days is a prerequisite to the commencement of federal Title VII proceedings (Resp. Br. 12; S. G. Br. 14). Given that Congress considered sixty days to be a sufficiently long period of deferral for purposes of Title VII, there is no basis for the claim that this period does not provide sufficient time for state authorities to respond to ADEA charges.

II.

The Solicitor General claims that state filing should not be mandatory because a claimant can render the state proceedings a nullity by refusing to cooperate. However, the Solicitor does concede that the sixty day deferral period of Section 14(b) serves a valuable purpose for those ADEA claimants who, at the

2. The statute of limitations is three years in the case of willful violations.

time they commence the processing of their claims, desire to utilize the state enforcement mechanism. For these individuals, the Solicitor General claims that Section 14(b) "guards against a too-quick change of mind that could undermine the administrative process almost before it gets underway." (S. G. Br. 16.)

The sixty day period can also serve valuable purposes for "uncooperative" individuals. In these cases, the sixty day period guards against a precipitous resort to the federal courts. During this time, age discrimination claims may very well be resolved or claimants may change their minds about immediately instituting lawsuits and allow the state proceedings to run their course before suit is commenced.

However, a complainant's desire or lack of desire to cooperate with a statutorily prescribed procedure has no bearing on this case. To base the proper interpretation of a statute on whether an individual claimant desires to cooperate in utilizing the full range of administrative remedies available to him is totally contrary to the notion of exhaustion of administrative remedies. Nothing in Title VII requires a claimant to cooperate with a state agency, yet an unwillingness to cooperate does not excuse a Title VII claimant from filing a charge with a state agency as a jurisdictional prerequisite to instituting a lawsuit. Likewise, the fact that an individual's unwillingness to cooperate with state agency may defeat effective action is not a valid reason to conclude that Section 14(b) should not be read to require filing with a state agency. The legislative history of the ADEA makes clear that informal methods of conciliation should be stressed and suits filed only as a last resort (Pet. Br. 19). Interpreting Section 14(b) to be optional defeats this intent and encourages claimants not to cooperate with state agencies.

III.

The Solicitor General claims that interpreting Section 14(b) to require filing with state agencies is contrary to the philosophy

of the Fair Labor Standards Act ("FLSA"), 29 U. S. C. § 201 *et seq*. Specifically, the Solicitor argues that if Section 14(b) sets forth a mandatory prerequisite to lawsuits brought by aggrieved individuals, then the Secretary of Labor cannot bring suit unless the aggrieved party has sought relief from the appropriate state authority. In the view of the Solicitor, this means that the Secretary's ability to institute suit would be dependent upon private action or inaction, a result which the Solicitor claims is contrary to the policy expressed in the 1961 amendments to the FLSA (S. G. Br. 19-21).

The issue of whether Section 14(b) applies to lawsuits instituted by the Secretary of Labor is not before the Court.[3] However, regardless of whether Section 14(b) applies to the Secretary of Labor, the fact remains that under no circumstances will the Secretary be dependent on private action or inaction in order to commence ADEA litigation. If Section 14(b) does not apply to the Secretary of Labor, the state filing requirement obviously poses no problem since suit can be commenced without respect to whether resort has been had to the state agency. On the other hand, even if Section 14(b) is construed to set forth a prerequisite to lawsuits instituted by the Secretary, there is nothing in the ADEA which requires an aggrieved *individual* to file a timely charge with the State authority before the Secretary may commence litigation. Rather, the Secretary himself can notify the relevant State authority and thus eliminate any possibility that the suit will be barred by private inaction.[4]

3. The courts have split on this issue. *Compare Marshall* v. *Chamberlain Mfg. Corp.*, 443 F. Supp. 159 (M. D. Pa. 1977); *Usery* v. *West Essex General Hospital*, 15 FEP Cases 1130 (D. N. J. 1977) (Secretary of Labor must comply with Section 14(b)), *with Dunlop* v. *Crown Cork & Seal Co., Inc.*, 405 F. Supp. 774 (D. Md. 1976); *Cowlishaw* v. *Armstrong Rubber Co.*, 425 F. Supp. 902 (E. D. N. Y. 1977) (Section 14(b) does not apply to Secretary of Labor).

4. In some states, like the State of Iowa, the applicable age discrimination statute limits the filing of charges to aggrieved individuals and specified state officials. *See* Section 601 A.14(1), Code

(Footnote continued on next page.)

It should be noted that the Secretary of Labor's enforcement powers under the ADEA are not the same as under the Wage and Hour provisions of the FLSA. Prior to bringing an ADEA action, the Secretary must seek to conciliate the claim; there is no such requirement under the FLSA. *See* 29 U. S. C. § 626(b). And, should aggrieved individuals be unwilling to cooperate in conciliation or be unwilling to accept a settlement which the Secretary feels is reasonable, it is doubtful that the Secretary would institute any action. In short, the Secretary is unlikely to commence an action to seek recovery for an individual who is unwilling to cooperate with him.

In any event, the implications of interpreting Section 14(b) as setting forth a mandatory prerequisite upon litigation commenced by the Secretary of Labor is now largely an academic question. As of July 1, 1979, the Secretary of Labor will no longer have enforcement authority over the ADEA. Instead, this responsibility will be transferred to the Equal Employment Opportunity Commission ("EEOC"). *See Reorganization Plan No. 1 of 1978*, 43 Fed. Reg. 19,807 (May 9, 1978).[5]

In announcing the reorganization transferring enforcement authority for the ADEA to the EEOC, the President explained the reason for this change:

> There is now virtually complete overlap in the employers, labor organizations, and employment agencies covered by Title VII and the Age Discrimination in Employment Act. This overlap is burdensome to employers and confusing to victims of discrimination. *Message to the Congress Transmitting Reorganization Plan No. 1 of 1978. February 23,*

(Footnote continued from preceding page.)

of Iowa (App. 13). If these provisions are interpreted as preventing the Secretary of Labor from filing a charge, then, since the state does not provide a remedy, Section 14(b) expressly does not apply to the Secretary.

5. The President submitted this proposed reorganization to Congress on February 23, 1978 pursuant to 5 U. S. C. § 903(a). Congress did not disapprove the proposal during the next sixty days and, therefore, pursuant to 5 U. S. C. § 906, the reorganization became law.

1978, in Weekly Compilation of Presidential Documents, Vol. 14, No. 8, at 400 (February 27, 1978).

Interpreting Section 14(b) as being optional in nature frustrates the expressed intent of removing the confusion of overlapping laws and procedures. As noted above, in enforcing Title VII, the EEOC is required to give states a period of sixty days to resolve claims. The EEOC's enforcement of the ADEA should follow the same procedure. Otherwise, the confusion which the agency reorganization is designed to eliminate would continue since the EEOC would process all types of claims except age discrimination in one way and alleged ADEA violations in another. It makes no sense whatever to interpret the same statutory language being enforced by the same agency in two different ways.

IV.

Both Respondent and the Solicitor General place heavy reliance on remarks made by Congress in 1978 as being probative of Congressional intent when the ADEA was passed in 1967 (Resp. Br. 20-24; S. G. Br. 24-30). As noted in our original brief (Pet. Br. 24n), these remarks are not entitled to any weight in discerning the intent of the framers of the ADEA. This position is further supported by Respondent himself who, at two separate times in his brief, states:

> "The [1978 ADEA] Amendments are not relevant to the questions raised in this case." (Resp. Br. 3 n.1, 6 n.3)

Since none of the amendments were relevant to the questions raised in this case, the legislative history leading to these Amendments cannot be relevant.

Further, there is no legal or logical support for the Solicitor's bald assertion that Section 14(b) would have been amended to conform to the Committee's view but for the fact that Congress thought an amendment to be unnecessary (S. G. Br. 28). At the time Congress considered the amendments, the only courts of appeal which had issued opinions of this question had

held that Section 14(b) sets forth a mandatory prerequisite to civil suit. *See Goger* v. *H. K. Porter Co.,* 492 F. 2d 13 (3d Cir. 1974); *Curry* v. *Continental Airlines,* 513 F. 2d 691 (9th Cir. 1975).

As the Solicitor admits, Congress did amend the ADEA "to alter judicial decisions that in Congress' view were unfaithful to the 1967 Act." (S. G. Br. 28). Thus, in response to *United Air Lines* v. *McMann,* 434 U. S. 192 (1978), the ADEA's mandatory retirement provisions were changed. And, as a result of numerous court decisions concerning what was required to be a sufficient notice of intent to sue, *see, e.g., Dartt* v. *Shell Oil Co.,* 539 F. 2d 1256 (10th Cir. 1976), *aff'd by an equally divided Court,* 434 U. S. 99 (1977), Section 7(d) was amended and the timely filing of a charge of age discrimination with the Secretary of Labor was substituted for the notice of intent to sue as a prerequisite to civil suit. But the amendments did not respond to the existing precedent concerning Section 14(b). Congress' action in 1978 thus supports Petitioners' position and not Respondent.

V.

The Solicitor General attempts to distinguish Section 706(c) of Title VII from Section 14(b) of the ADEA on the basis of the existence of legislative history for Title VII which contains clear expressions of an intent for mandatory state deferral while no such legislative history exists with respect to the ADEA (S. G. Br. 12n.9, 21-23). As explained in our original brief (Pet. Br. 19-24), we believe that the legislative history of the ADEA does indicate clearly that state deferral was intended to be mandatory. However, even if the leigslative history of the ADEA is "not instructive" on this issue, as Respondent suggests (Resp. Br. 18), it does not follow that Congress intended state deferral to be optional. To the contrary, given the clear legislative history of Section 706(c), and the subsequent enactment of Section 14(b) in identical language, the burden is not on

petitioner to demonstrate that the two provisions should be interpreted in the same manner. Rather, it is incumbent upon Respondent and the Solicitor General to establish that, despite the identity of language, Congress clearly intended Section 14(b) to be interpreted differently from Section 706(c). This they have failed to do.

VI.

The Solicitor General suggests that because Congress, when adopting the ADEA in 1967, had a "dim view" of the effectiveness of state agencies in enforcing laws against age discrimination, it is unlikely that it intended to make recourse to these agencies mandatory (S. G. Br. 23). This ignores the fact that Congress dealt with this problem by expressly making Section 14(b) applicable only

> [i]n the case of alleged practices occurring in a state which has a law prohibiting age discrimination in employment because of age and establishing or authorizing a state authority to grant or seek relief from such discriminatory practice . . . .

In short, Congress limited its deferral requirement to those states which had established procedures to enforce age discrimination charges. *See, e.g., Bertrand* v. *Orkin Exterminating Co.*, 419 F. Supp. 1123 (N. D. Ill. 1976). There is no basis for concluding that Congress intended to give each claimant the option of deciding on the effectiveness of state enforcement mechanisms.[6]

VII.

Both Respondent and the Solicitor General argue that if state filing is held to be mandatory, the time limits of Section

6. There has been no suggestion at any time in this case that the Iowa State Civil Rights Commission does not possess sufficient authority to warrant the invocation of Section 14(b). In fact, the Iowa State Civil Rights Commission, like most other state agencies, handles age discrimination charges in the exact same fashion as claims of discrimination falling under Title VII (App. 9-16).

14(b) should be subject to the principle of equitable tolling (Resp. Br. 24-26; S. G. Br. 30-33). This argument is yet another attempt to subvert the purpose of Section 14(b) by eliminating the mandatory nature of compliance with specified time limits.

For this reason, this Court has rejected the concept of equitable tolling of time limits in the Title VII context. In *IUE, Local 790* v. *Robbins & Myers, Inc.*, 429 U. S. 229 (1976), the Court refused to apply equitable tolling to Title VII's time limits during the pendency of the grievance procedure under the applicable collective bargaining contract. The Court held (429 U. S. at 240):

> Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a "slight" delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites with precision, *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 47, Congress did not leave the courts the decision as to which delay might or might not be "slight".

This analysis applies with equal force here. Congress has set forth specific time limits in the ADEA. There is therefore no reason for the courts to engraft upon these time limits the doctrine of equitable tolling to allow claimants additional time beyond that specified in the statute.[7]

7. The Solicitor suggests that the Court remand this case to the district court to retain jurisdiction while respondent initiate proceedings with the Iowa State Civil Rights Commission. The Solicitor claims that the Court "has followed this path" in the Title VII context in *Crosslin* v. *Mountain States Telephone & Telegraph Co.*, 400 U. S. 1004 (1971) (S. G. Br. 32). However, in *Crosslin,* where the Solicitor suggested this position, the Court, in remanding the case to the district court, expressly stated (400 U. S. at 1004):

> By this remand this Court intimates no view as to the merits of the Solicitor General's position.

Shortly thereafter, this Court did state its view with respect to state deferral under Title VII. As Respondent concedes, in *Love* v. *Pullman Co.*, 404 U. S. 522 (1972), this Court held state filing to be mandatory in Title VII cases (Resp. Br. 12).

Acceptance of the tolling principle will serve only to undo the purpose of the ADEA's time limits which are designed to maximize expeditious settlement of age discrimination claims. If tolling is allowed, virtually every claimant who files a lawsuit would attempt to present some excuse for his failure to file in timely fashion, thus creating additional issues requiring factual hearings in the trial court. There is no legal basis for burdening the trial courts in this manner.

In sum, the ADEA's time limits are set forth in clear and unqualified terms. Equitable tolling would prolong the resolution of these claims and congest the courts with claimants who have not complied with the Act.[8]

8. Respondent states that the reason equitable tolling should be applied in this case is that he relied on misinformation from the Department of Labor and at the time of his filing there was no precedent from the Court of Appeals for the Eighth Circuit to guide him. However, when Respondent retired on January 31, 1976 and when he filed his notice of intent to sue with the Department of Labor on March 10, 1976, the only courts of appeal which had decided this issue had both held state filing to be mandatory. *See Goger* v. *H. K. Porter Co.*, 492 F. 2d 13 (3d Cir. 1974); *Curry* v. *Continental Airlines*, 513 F. 2d 691 (9th Cir. 1975). Further, Respondent's notice of intent to sue, which was filed at a time when he still could have filed a timely charge with the Iowa State Civil Rights Commission, was submitted by his attorney. In the Title VII context, the courts have rejected the principle of equitable tolling where plaintiff has retained counsel before the expiration of the filing period. *See Keyse* v. *California Texas Oil Corp.*, ... F. 2d ....., 18 FEP Cases 1397 (2d Cir. December 21, 1978).

CONCLUSION.

For all of the foregoing reasons, as well as for those reasons set forth in our original brief, we respectfully request the Court to reverse the decision of the Eighth Circuit Court of Appeals and remand this case to the district court with directions to dismiss this lawsuit.

Respectfully submitted,

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FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1978

OSCAR MAYER & CO., ET AL., PETITIONERS

v.

JOSEPH W. EVANS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-275

OSCAR MAYER & CO., ET AL., PETITIONERS

v.

JOSEPH W. EVANS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether Section 14(b) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633(b), requires an aggrieved person to resort to available state remedies before bringing suit under Section 7(c) of the Act, 29 U.S.C. 626(c).

INTEREST OF THE UNITED STATES

The Age Discrimination in Employment Act ("ADEA") was designed to "promote employment

of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment" (29 U.S.C. 621(b)). The Secretary of Labor is responsible under the Act for investigating complaints of age discrimination in employment and attempting to eliminate "through informal methods of conciliation, conference, and persuasion" practices that violate the Act (29 U.S.C. 626(a) and (b)). The Secretary may bring suit for appropriate relief if the conciliation process fails (29 U.S.C. 626(b)). The ADEA also authorizes private actions by "[a]ny person aggrieved" because of age discrimination in employment (29 U.S.C. 626(c)). Such private suits are important adjuncts to the Secretary's enforcement efforts.

The Act's scope is broad,[1] and it generates a correspondingly large volume of age discrimination complaints. For example, the Secretary filed 86 suits during 1977, and in that year at least 433 private enforcement actions were filed in the federal district

[1] The ADEA applies to any employer with 20 or more employees in any industry affecting interstate commerce. It applies also to recruiting, advertising and referrals by employment agencies serving covered employers, and to specified actions by unions that have 25 or more members and represent or seek to represent the employees of such employers. 29 U.S.C. 623, 630. As enacted in 1967, the Act protected persons between 40 and 65 years of age. 29 U.S.C. 631. The Act's protections now have been extended, for most purposes, to persons between 40 and 70 years of age. Pub. L. No. 95-256, Section 3, 92 Stat. 189-190.

courts.[2] By providing an effective alternative to suits by the Secretary, private enforcement actions free the Secretary to devote his efforts to cases of significant precedential value and to those arising out of company-wide patterns and practices. Cf. *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972).

Questions concerning the procedural requirements of the Act have diminished the effectiveness of private enforcement actions. A substantial percentage of the reported private actions under the ADEA have been dismissed on grounds relating at least in part to procedural prerequisites to suit. Many persons with colorable substantive claims are not sophisticated in the ADEA's procedural rules, and forfeiture of rights has become common. The Secretary is concerned that the effectiveness of private proceedings not be diminished by interpretations of procedural rules that make them traps for the unwary. See *Love* v. *Pullman Co.*, 404 U.S. 522, 526-527 (1972). The Secretary also is concerned the Act's procedural prerequisites not be interpreted to compel the Secretary to resort to state proceedings before he may file suit. The United States therefore has a substantial interest in this case.

STATEMENT

1. The Age Discrimination in Employment Act of 1967, 29 U.S.C. 621-634, as amended by Pub. L. No.

[2] Department of Labor, *Age Discrimination in Employment Act of 1967: A Report Covering Activities Under the Act During 1977* 25 (1978).

95-256, 92 Stat. 189, prohibits most employers from discriminating against employees between the ages of 40 to 70 on the basis of age.[3] Under 29 U.S.C. 626 (b), the Act is administered by the Secretary of Labor and is "enforced in accordance with the powers, remedies, and procedures provided in" the Fair Labor Standards Act, 29 U.S.C. 211(b), 216, 217. See *Lorillard* v. *Pons*, 434 U.S. 575 (1978).

A person who believes that he has been treated unlawfully may bring suit for appropriate legal or equitable relief. 29 U.S.C. 626(c). Before doing so, however, he must give notice of his intent to file such a suit to the Secretary of Labor no later than 180 days after the alleged unlawful practice, and he cannot sue until at least 60 days after he gives such notice. 29 U.S.C. 626(d).[4] The Act requires the Secretary, when notified of an employee's intent to sue, to attempt resolution of the problem by informal methods of "conciliation, conference, and persuasion." 29 U.S.C. 626(d).

If the problem is not resolved during the 60 days, either the employee or the Secretary may bring an action for relief. 29 U.S.C. 626(b), (c), (d). A

[3] The Act provides exceptions where age is a bona fide occupational qualification, and it does not prohibit action taken pursuant to a bona fide seniority system or employee benefit plan. 29 U.S.C. 623(f), as amended by Pub. L. No. 95-256, 92 Stat. 189.

[4] In 1978 the Act was amended to require the employee to file with the Secretary a "charge alleging unlawful discrimination," rather than a notice of intent to sue. The time limits remain unchanged. Pub. L. No. 95-256, Section 4, 92 Stat. 190. See also note 5, *infra*.

suit by the Secretary terminates the right of the employee to sue in his own name. 29 U.S.C. 626(c). The Act adopts the statute of limitations from the Fair Labor Standards Act, and thus a suit cannot be filed more than two years after the alleged unlawful practice (three years if the practice is allegedly willful). 29 U.S.C. 626(e); see 29 U.S.C. 255.

If the events in question occur in a state that has both a law prohibiting age discrimination and a state authority than can grant or seek relief from such discrimination, "no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated * * *." Section 14(b), 29 U.S.C. 633(b).[5] Any action brought under the ADEA "supersede[s] any State action," however, 29 U.S.C. 633(a).

2. Respondent was employed by petitioner Oscar Mayer & Co. for 23 years, until his involuntary retirement in Iowa on January 31, 1976 (A. 4).[6] The "retirement" took place under threat of dismissal;

[5] "[I]n a case to which section 633(b) * * * applies," the employee's notice of intent to sue must be given to the Secretary within 300 days of the alleged discrimination (rather than the 180 days otherwise provided), or within 30 days after the employee is notified that proceedings under state law have been terminated, whichever date is earlier. 29 U.S.C. 626 (d)(2).

[6] The facts of this case are found in the complaint (A. 3-6). Because this case was certified by the district court for an interlocutory appeal before petitioners even filed an answer, the allegations of the complaint must be accepted as true.

Oscar Mayer removed respondent in this way solely because of his age and not because of any deficiency in performance of his job (A. 4). On March 10, 1976, respondent filed with the Secretary a notice of intent to sue, asserting that his dismissal violated the ADEA (A. 5). The Department of Labor attempted to resolve the dispute without litigation, but these efforts failed. Respondent filed this action in the United States District Court for the Southern District of Iowa on March 7, 1977, slightly less than one year after his notice to the Secretary.

Iowa has a statute prohibiting discrimination in employment based on age (Iowa Code Ann. § 601A.6 (1)(a) (West 1975). The statute authorizes the Iowa Civil Rights Commission to investigate complaints alleging such discrimination and to order reinstatement or other appropriate relief where warranted (*id.* at § 601A.14). Respondent did not seek relief from that Commission before filing this action (Pet. App. A2).

Petitioners moved to dismiss the complaint for lack of jurisdiction (A. 7), arguing that 29 U.S.C. 633 (b) required respondent to resort to Iowa's remedies before filing suit under the Act (see Pet. App. A1). The district court held that "such resort is not a mandatory or jurisdictional prerequisite to the filing of an ADEA suit in federal court" (Pet. App. A6) and denied the motion.

A divided panel of the court of appeals reversed,[7]

[7] The district court certified its ruling for interlocutory appeal under 28 U.S.C. 1292(b), and the court of appeals allowed the appeal (Pet. App. A16).

holding that respondent should have sought relief from Iowa authorities but that his failure to do so might be excused if there were extenuating circumstances. It remanded for the district court to consider the question of excuse (Pet. App. A12-A13). The panel then granted rehearing, withdrew its first opinion, and affirmed the district court's order (Pet. App. A15-A21). Relying on *Gabriele* v. *Chrysler Corp.*, 573 F.2d 949 (6th Cir. 1978), petition for cert. pending, No. 78-1, the panel concluded that the Act does not require an aggrieved person to seek relief from a state agency prior to filing suit, and it held that "such an individual has the option of proceeding first before the state agency and then in the federal court or of proceeding initially in the federal court without prior resort to the state agency" (Pet. App. A19).

SUMMARY OF ARGUMENT

Most of the procedural provisions of the Age Discrimination in Employment are drawn from the Fair Labor Standards Act ("FLSA") (see generally *Lorillard* v. *Pons*, 434 U.S. 575 (1978)), because Congress was dissatisfied with the bureaucratic delays and procedural hurdles encountered in enforcement of Title VII of the Civil Rights Act of 1964. But Congress did adopt one feature of Title VII: a requirement of some resort to the administrative process prior to suit. The central question in this case is whether Section 14(b) of ADEA, 29 U.S.C. 633(b), parallels the provision of Title VII that has

been understood as requiring resort to available state remedies.

The language of Section 14(b) can be read to mean either (a) that every person must commence state proceedings and then wait 60 days before filing a federal suit, or (b) that, if any person commences state proceedings, he must give the state agency 60 days to work on his case before filing suit. The structure of ADEA demonstrates that Congress intended the latter interpretation.

Unlike the conciliation process of Title VII, Section 14(b) of ADEA does not provide a waiting period before federal assistance can be sought. A charge can be filed with federal officials without regard to the invocation of state procedures; the 60-day provision is a delay only on filing suit. Furthermore, persons who think it to their advantage to resort to state remedies will do so regardless of whether that is compelled by Section 14(b); those who do not think that it is to their advantage are not bound to cooperate with state officials, even if prior resort to state processes are required, and by hypothesis they are not likely to do so. If resort to state remedies is required, an aggrieved party who withholds cooperation can make the state proceedings meaningless, and state agencies will have little incentive to devote their limited resources to 60 days' worth of conciliation in cases involving these persons. It is therefore most unlikely that petitioners' construction of the statute would enhance the usefulness of the administrative process or lead to settlements that

could not be achieved as easily through private negotiation or by conciliation through the Department of Labor.

The legislative history of ADEA demonstrates skepticism about the efficacy of age discrimination laws in effect in 24 states at the time ADEA was enacted. There is no mention in the legislative history by any Member of Congress that Section 14(b) would require resort to state remedies. Ten years after passage of ADEA, the 95th Congress thoroughly reviewed the Act and its administration. The Senate committee, in a discussion adopted by the conference committee, expressly stated that Section 14(b) "does not require that the individual go to the State first in every instance" and that judicial decisions requiring such resort were erroneous. S. Rep. No. 95-493, 95th Cong., 1st Sess. 6-7 (1977). This legislative history supports our reading of the statute.

Finally, ADEA is remedial legislation, entitled to be liberally construed, especially where, as here, there is danger of creating traps for the unwary and procedural bars to the consideration of otherwise meritorious suits.

If, contrary to our submission, the Court should conclude that Section 14(b) requires every person to resort to available state remedies, it should remand the case for a determination whether respondent's neglect may be excused, in light of his argument that he relied on advice from the Department of Labor that resort to state remedies was not required under ADEA.

ARGUMENT

I

THE ADEA DOES NOT REQUIRE AN AGGRIEVED PERSON TO RESORT TO STATE REMEDIES BEFORE FILING SUIT IN FEDERAL COURT

A. Introduction

The Age Discrimination in Employment Act is an amalgam of provisions drawn from other statutes. Most of the substantive provisions were drawn from Title VII of the Civil Rights Act of 1964, but most of the procedural provisions were drawn from the Fair Labor Standards Act ("FLSA"). See generally *Lorillard* v. *Pons*, 434 U.S. 575 (1978).

The mixture was intentional. When Congress enacted the ADEA in 1967, it already was dissatisfied with the sluggish pace of proceedings under Title VII. The initial proposed bill,[8] which borrowed enforcement provisions from Title VII and the National Labor Relations Act, met with substantial opposition from legislators who feared that the establishment of another bureaucracy and the employment of Title VII and NLRA procedures would produce "the same delays which plague * * * the EEOC and the NLRB." 113 Cong. Rec. 7076 (1967) (Sen. Javits). Senator Javits, the principal sponsor of the age discrimination legislation (see S. Rep. No. 723, 90th Cong., 1st Sess. 13 (1967)), characterized these procedural stumbling blocks as "always unfortunate, but

[8] S. 830, 90th Cong., 1st Sess., 113 Cong. Rec. 2795 (1967).

* * * particularly so in the case of older citizens to whom, by definition, relatively few productive years are left." 113 Cong. Rec. 7076 (1967).

Senator Javits therefore proposed that Congress incorporate the procedures of the FLSA, 29 U.S.C. 201 *et seq.*, which relies for enforcement exclusively on suits brought by aggrieved persons and the Secretary of Labor. "By utilizing the courts [directly] * * * as the forum to hear cases arising under the law," it was hoped that the problems of delay and procedural roadblocks could be "largely avoided." 113 Cong. Rec. 7076 (1967). The nearly identical House and Senate bills that became the ADEA adopted Senator Javits' approach. See S. 830, 90th Cong., 1st Sess., Section 7 (1967); H.R. 13054, 90th Cong., 1st Sess., Section 7 (1967). See also 113 Cong. Rec. 35055 (1967) (Sen. Yarborough, the bill's manager).

The enforcement provisions thus designed for the ADEA relieved complainants of many of the procedural requisites of Title VII actions. For example, the ADEA omitted any requirement that an agency find reasonable cause as a prerequisite to suit (compare 42 U.S.C. (1964 ed.) 2000e-5(a) and (e)), and omitted with it any requirement of prompt suit after receiving an administrative determination (compare 42 U.S.C. 2000e-5(d)). There were many other changes as well, some of which are discussed in this Court's opinion in *Lorillard* v. *Pons*, *supra*.

But Congress adopted for the ADEA one feature modeled after Title VII's procedures: a requirement

of some resort to the administrative process prior to suit. An aggrieved person must file a complaint with the Secretary of Labor, and the statute gives the Secretary 60 days to attempt to achieve settlement of the dispute by informal methods. 29 U.S.C. 626 (b) and (d).

Congress also desired state agencies to play a role in the conciliation process. Section 14 of the ADEA, 29 U.S.C. 633, permits state and federal administrative proceedings to continue simultaneously. Section 14(b), 29 U.S.C. 633(b), the center of contention in this case, provides that if a state has a statute prohibiting age discrimination and a state agency that can grant or seek relief from such discrimination, then "no suit may be brought under [the ADEA] before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated * * *." The parallel provision of Title VII, 42 U.S.C. 2000e-5(c), has been understood as requiring a request for available relief from a state agency before the EEOC may consider a charge of discrimination. See *Love* v. *Pullman Co.*, 404 U.S. 522 (1972).[9] The

[9] The construction of 42 U.S.C. 2000e-5(c) has been justified by the legislative history of Title VII, which reveals an unmistakable congressional intent to require aggrieved persons to seek available relief from state agencies in the first instance. *Dubois* v. *Packard Bell Corp.*, 470 F.2d 973, 975 (10th Cir. 1972) (the legislative history of Title VII is "so manifestly clear as to remove all doubt" on this score); cf. Pet. Br. 12 (quoting remarks of Sen. Humphrey). As we show at pages 21-23, *infra*, the legislative history of the ADEA is otherwise.

central question in this case, then, is whether the parallel to the Title VII procedures holds.

Certainly the language of Section 14(b) does not compel the conclusion that every aggrieved person must resort to any available state remedy. The statute can be read to mean either (a) that every person must commence state proceedings and wait 60 days before filing a federal suit,[10] or (b) that if any person voluntarily commences state proceedings, he must give the state agency 60 days to work on his case before commencing a federal suit.[11] The statute does not preclude either of these readings.

In our view, the most important guide to the meaning of Section 14(b) is the way in which the provisions of the ADEA relate to one another. Section 14 is different in important ways from the comparable provision of Title VII, so that what makes sense under Title VII would be useless under the ADEA. We turn to a discussion of these differences.

[10] Two courts of appeals have adopted this reading of the statute. See *Reich* v. *Dow Badische Co.*, 575 F.2d 363 (2d Cir. 1978); *Curry* v. *Continental Airlines*, 513 F.2d 691, 693 (9th Cir. 1975) (dictum).

[11] Three courts of appeals have adopted this reading. In addition to the decision in the instant case, see *Holliday* v. *Ketchum, MacLeod, & Grove, Inc.*, 584 F.2d 1221 (3d Cir. 1978) (en banc), overruling *Goger* v. *H. K. Porter, Inc.*, 492 F.2d 13 (3d Cir. 1974); *Gabriele* v. *Chrysler Corp.*, 573 F.2d 949 (6th Cir. 1978), petition for cert. pending, No. 78-1. See also Comment, *Procedural Prerequisites to Private Suit Under the Age Discrimination in Employment Act*, 44 U. Chi. L. Rev. 457, 475-480 (1977), which supports this view.

B. The structure of the ADEA establishes that aggrieved persons need not resort to state procedures

1. *Section 14 does not defer to state procedures, and the short time limits of the Section would make involuntary use of state procedures futile*

As petitioners emphasize (Br. 8-10), resort to state procedures before commencing suit in federal court may lead to settlements and compromises, thus reducing the need for litigation and alleviating court congestion. It is unquestionably true that settlement is preferable to litigation, both because it is quicker and because it uses less of the courts' scarce resources. This consideration supplies much of the force behind petitioners' argument.

The structure of Title VII emphasizes settlement and gives to the conciliation process a prominence that encourages settlement. Under 42 U.S.C. 2000e-5(c) an aggrieved person cannot file a complaint on which the EEOC can act until he first has sought relief from state agencies, if such relief is available. During this initial period, then, the state agency has exclusive jurisdiction to seek conciliation. Once the 60 days of exclusive jurisdiction have expired, the EEOC can process and mediate the claim. Now two agencies are allowed to negotiate; the statute still forbids suit. The conciliation process begun by the state agency during its period of exclusive jurisdiction can continue. The aggrieved person cannot file suit until the EEOC issues a formal notice of right

to sue.[12] And even if a suit is filed the state's administrative process can continue. This statutory plan gives conciliation ample time to succeed, and it gives the state agency a period of exclusive authority before federal powers are invoked.

The structure of Section 14 of the ADEA is significantly different. Although a person who seeks relief from a state agency must wait 60 days, the waiting period is *not*—as it is under Title VII—a wait before filing a charge with federal officials. The charge with federal officials can be filed at any time within 180 days after the alleged discrimination, without regard to the invocation of state procedures. 29 U.S.C. 626(d).

It is thus unquestionably true, as several courts have emphasized, that the ADEA reflects considerably less deference to state procedures than does Title VII.[13] More than that, however, the differences

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[12] The EEOC now must issue this notice within 180 days of the filing of the charge. 42 U.S.C. 2000e-5(f)(1). Its regulations permit earlier notice under some circumstances. Under the provisions of Title VII that were in effect when the ADEA was enacted, however, the EEOC could not issue this notice until mediation had failed or it found probable cause to believe that there had been discrimination. 42 U.S.C. (1964 ed.) 2000e-5(a) and (d). This process could take years, and the difference between the ADEA and Title VII must be considered in light of the provisions of Title VII that were in effect when the ADEA was enacted. In 1967 the Title VII process could require conciliation under both state and federal agencies to continue for a substantial time before suit was filed, thus giving the state agency time to ascertain the facts and make extended efforts. Under ADEA the mandatory wait before suit never has exceeded 60 days.

[13] See the cases cited in note 11, *supra*.

between Title VII and the ADEA make compulsory resort to state procedures under the ADEA futile.

To see why this is so, assume that there are two types of aggrieved persons: those who would seek state assistance without the compulsion of the ADEA, and those who would not. Those who see advantages in the state process will use it whether or not Section 14 of the ADEA is read to compel that result. These persons presumably will cooperate with the state agencies and assist in the resolution of their grievances. For these persons the administrative process is likely to be helpful, if pursued to completion. Section 14(b) serves a valuable purpose by requiring persons who have invoked state remedies to continue to pursue them for at least 60 days; in other words, for this class of persons, Section 14(b) guards against a too-quick change of mind that could undermine the administrative process almost before it gets underway.

Those who do not see advantages in the state procedures will not invoke them unless required to do so by federal statute. Presumably these are the persons about whom petitioners profess concern. But it is most unlikely that, given the structure of the ADEA, a requirement that these persons file a state complaint against their will would do the slightest good. Nothing in the ADEA requires an aggrieved party to cooperate with the state agency; it is unlikely that the class of persons who do not see advantages in the state process will cooperate extensively. Such cooperation, however, would be essential,

because, even under petitioners' arguments, any person could give the state no more than 60 days to investigate, negotiate, and settle the case to the satisfaction of both the complainant and the alleged wrongdoer. Thus the aggrieved party could make the state proceedings an empty gesture by withholding active cooperation. A state agency ordinarily could not conciliate an age discrimination complaint within 60 days without help from both sides.[14]

It also is important to understand the effect of Section 14(a) on the incentives of state agencies. Because the ADEA allows mediation by state agencies to proceed simultaneously with mediation by the Secretary of Labor, a state agency rationally would choose to devote its resources to those complainants who came voluntarily and cooperated most fully. The agency would choose to leave other cases to the Secretary and the courts.

In sum, the structural differences between Title VII and the ADEA demonstrate that it would be futile to read the latter as requiring every complainant to resort to state procedures. Under Title VII the state procedure has time to work; no suit can be filed until the EEOC issues a notice of right

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[14] Some complaints might be capable of resolution within 60 days even without much help from the complainant. But these would be simple complaints or ones in which the alleged wrongdoer promptly admitted error. It is fair to suppose that these cases could be settled as easily and as quickly by informal contacts between complainant and employer, or through the auspices of the Department of Labor, without the need for a state agency.

to sue; even if a suit is filed, the state can continue to attempt to resolve the dispute. Under Title VII, then, complainants have incentives to cooperate with state agencies, and the agencies have incentives to devote enough time and energy to particular cases to produce settlements. Under the ADEA the state procedure has but 60 days to work; suit can be filed long before conciliation has been given a fair chance. Under the ADEA complainants who do not see advantages in the state procedures have no incentive to cooperate with state agencies, and the agencies have little or no incentive to devote their resources to the conciliation of such cases. It is therefore most unlikely that petitioners' construction of the statute would enhance the usefulness of the administrative process or lead to settlements that could not be achieved as easily by private negotiation or by conciliation through the Department of Labor.

We therefore submit that Section 14(b) should be understood to apply only to those persons who voluntarily take their complaints to state agencies. The statute means that a person who invokes the state's process must give the state at least a brief time to deal with his complaint before filing suit. If after 60 days the complainant is dissatisfied with the way things are going, however, he can opt out and pursue his federal remedy.

2. The provision for suits by the Secretary of Labor establishes that resort to state remedies is unnecessary

There is another reason, supplied by the structure of the ADEA, why Section 14(b) should not be read to require resort to state remedies in every case. Section 7(b) of the ADEA, 29 U.S.C. 626(b), incorporates several provisions of the Fair Labor Standard Act, including provisions allowing the Secretary to bring suit on behalf of any aggrieved person. Section 7(c) provides that a suit by the Secretary terminates the right of the complainant to sue on his own behalf. Section 7(b) qualifies the FLSA procedures only by requiring the Secretary first to "attempt to eliminate the [alleged] discriminatory practice * * * and to effect voluntary compliance * * * through informal methods of conciliation, conference, and persuasion."

Section 14(b), however, applies its 60-day deferral period to all suits; it does not distinguish between suits filed by private persons and suits filed by the Secretary. If, as petitioners contend, Section 14(b) requires resort to state remedies as a precondition to suit in every case, then the statute likewise would appear to require the aggrieved party to seek relief from the states before the Secretary can sue. That interpretation is demonstrably contrary to the provisions of the FLSA that the ADEA expressly incorporates.

Between 1949 and 1961 the Secretary was not authorized to bring a suit against an employer under the FLSA to secure the statutory minimum wages or

overtime compensation unless the employee specifically requested the Secretary to do so. 29 U.S.C. (1958 ed.) 216(b). Congress removed that restriction in 1961 (75 Stat. 74) after finding that "[t]his limitation has impeded the Secretary in his efforts to enforce the act since many * * * are hesitant about requesting legal action against their employers." S. Rep. No. 145, 87th Cong., 1st Sess. 20 (1961). The statute now allows the Secretary to sue without regard to the employees' requests or other actions.[15] 29 U.S.C. 216(c). It was this new, and independent, right to sue that Congress incorporated into the ADEA in 1967.

If the Secretary may not bring suit under the ADEA unless the aggrieved person has first sought relief from a state agency, the Secretary would be dependent once again on private action or inaction, the very limit that Congress pointedly discarded in 1961. Nothing in the legislative history of the ADEA suggests that Congress intended to restrict the Secretary's right to sue in this fashion.

Nor can Section 14(b) reasonably be read to require the Secretary himself to invoke state remedies before bringing a federal suit. Such a requirement has never been part of the FLSA, and, when ADEA was enacted, there were no administrative restrictions of any kind on the Attorney General's authority to bring suit under Title VII. See 42 U.S.C. (1964 ed.) 2000e-6(a); *United States* v. *Masonry Construc-*

[15] See generally *Hodgson* v. *Wheaton Glass Co.*, 446 F.2d 527, 532 (3d Cir. 1971).

tion Association, 497 F.2d 871, 875-876 (6th Cir. 1974). Nothing in the legislative history of the ADEA suggests that Congress intended to restrict the Secretary of Labor's access to federal courts. And in the absence of clear evidence of legislative intent, it would be anomalous to require that a federal officer seeking to vindicate federal rights not assert his express statutory authority to file suit in federal court until he has first sought relief from a state administrative agency. Consequently, because the language of Section 14(b) does not distinguish between suits by the Secretary and suits by private persons, it is necessary to construe Section 14(b) to avoid any requirement of compulsory resort by the aggrieved person to the state agency.[16]

C. The legislative history of the ADEA does not suggest that resort to state procedures is mandatory

1. *The 1967 debates*

As we pointed out above, courts have understood the section of Title VII from which Section 14(b) of the ADEA was drawn as requiring an aggrieved party to resort to state remedies first in every instance. They have done so principally because of the clear legislative history supporting that result. There is no similar legislative history for the ADEA.

[16] Once state proceedings have been commenced voluntarily, of course, the 60-day rule comes into play and binds the Secretary as well as the complainant. The Secretary consequently does not file suit under the ADEA within 60 days after a complaint has been filed with a state administrative agency.

Quite the contrary, as the Court held in *Lorillard* v. *Pons*, *supra*, the procedural rules of the ADEA are not copied from Title VII, and the interpretation given to Title VII therefore is not a reliable guide to the interpretation of the ADEA. See 434 U.S. at 584-585. Congress wanted to avoid the procedural niceties and delays that had come to characterize Title VII cases (see pages 10-11, *supra*).

The debates on the ADEA do not demonstrate congressional admiration of state administrative remedies or any desire to make them a mandatory first step. Although by 1967 some 24 states had enacted age discrimination legislation similar to the bills pending in Congress,[17] Senator Javits, the chief sponsor of the ADEA, stated:

> The experience under the State laws has been varied. Unfortunately, most States have not made available sufficient funds or manpower to really make a dent in the problem. However, where forceful attempts have been made, especially in some demonstration projects, great success has been achieved.

113 Cong. Rec. 31254 (Nov. 6, 1967). This mixed review of state efforts was repeated by Rep. Matsunaga, who concluded that "most of these [state] laws are inadequate to bring about effective compliance." *Id.* at 34742. See also the statement of Rep. Dwyer, *id.* at 34752: "[T]hough 24 of the States * * * have laws banning age discrimination, many of the laws have

[17] See H.R. Rep. No. 805, 90th Cong., 1st Sess. 2 (1967); S. Rep. No. 723, 90th Cong., 1st Sess. 2 (1967).

not been implemented and most of the States lack the resources to assure compliance." The committees that worked on the bills shared this appraisal. See H.R. Rep. No. 805, 90th Cong., 1st Sess. 2 (1967); S. Rep. No. 723, 90th Cong., 1st Sess. 2 (1967).

It is unlikely that a Congress with such a dim view of the effectiveness of state efforts wanted to make resort to state remedies necessary in every case, thus increasing the state agencies' caseloads and spreading still thinner their limited resources. It is thus significant that no one mentioned that Section 14(b) would require resort to state remedies.

The omission is telling because the committee reports explicitly observe that the statute would forbid suits until the aggrieved party had given to the Secretary a notice of intent to sue and waited 60 days. The House Committee stated:

> The bill, in section 7, also provides that the Secretary may bring an action to require compliance. As was stated, aggrieved persons may similarly bring actions but a condition precedent to the bringing of an action by an individual, is notice to the Secretary and the elapse of a period of 60 days. This is to allow the Secretary to mediate the grievance.

H.R. Rep. No. 805, *supra*, at 5. The Senate Committee agreed (S. Rep. No. 723, *supra*, at 5):

> The bill now authorizes an individual, as well as the Secretary of Labor, to seek remedies through court action. A condition precedent to the bringing of [an] action by an individual is that he

must give the Secretary 60 days' notice of his intention to do so.

If Congress also meant to require aggrieved persons to resort to state remedies, and to wait 60 days after seeking state relief before filing suit, surely some Member of Congress would have said so.[18]

2. *The 1978 amendments*

The 95th Congress thoroughly reviewed the ADEA and its administration. This review led to the enactment in 1978 of numerous amendments. Pub. L. No. 95-256, 92 Stat. 189. Although Congress did not amend Section 14(b), it examined the decisions construing that Section and stated its view that the statute, as it had been enacted in 1967, does not require resort to state remedies. Consequently, the Senate Committee concluded (S. Rep. No. 95-493, 95th Cong., 1st Sess. 6-7 (1977):

[18] Petitioners rely (Br. 22) on the testimony of Andrew Biemiller, who appeared before the Senate committee and urged adoption of Title VII procedures. But, as the Court has recognized, Congress by and large rejected the suggestion to adopt Title VII procedures. See *Lorillard* v. *Pons, supra*. The remarks of Edward Conway (Pet. Br. 22-23) concerning federal-state relationships are even less precise than Biemiller's; and Congress rejected Conway's advice when it permitted concurrent federal and state administrative procedures (see S. Rep. No. 723, *supra*, at 6; H.R. Rep. No. 805, *supra*, at 6). At all events, these isolated statements by persons who were not Members of Congress provide no guidance in interpreting the 1967 Act, because there is no reason to think that Congress discussed or responded favorably to them. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 204 n.24 (1976); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 31 & n.20 (1977).

Section 14(b) of the Act provides that where an act of discrimination occurs in a State which has an age discrimination law and an agency empowered to grant or seek relief from such discriminatory practices, no suit may be brought under section 7 of this Act before the expiration of sixty days after proceedings have been commenced under State law, unless such proceedings have been earlier terminated. This provision requires that if an individual chooses to apply for relief he must give the State the prescribed minimum period in which to take remedial action before he may turn to the federal courts for relief under the ADEA. The provision does not require that the individual go to the State first in every instance.

Several courts have properly recognized this distinction. [Citations omitted.]

Other courts, however, have ruled that the complainant must go initially to the State authorities in every instance, and that failure to do so requires dismissal of the federal action. [Citations omitted.]

It is the committee's view that an individual who has been discriminated against because of age is free to proceed either under state law or under federal law. The choice is up to the individual. However, as Section 14(b) makes clear, if the individual does choose to proceed initially under State law, he must give the State agency at least 60 days to take remedial action before he may commence a federal action.

This discussion could not be clearer. An aggrieved person may choose either state or federal remedies,

and Section 14(b) "does not require that the individual go to the State first in every instance." The Conference Committee agreed with this analysis of the statute (see H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 12 (1978)), and both chambers adopted the conference report without further amendment to the bill. 124 Cong. Rec. H2278 (daily ed. March 21, 1978); 124 Cong. Rec. S4452 (daily ed. March 23, 1978).

Petitioners argue (Br. 24 n.*) that these congressional remarks, although explicit and adopted without dissent in the course of a revision of the statute, are inconsequential because the statements of one Congress about what another Congress did are not entitled to respect by the courts. If petitioners mean that such discussions are to be evaluated carefully, we agree. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313 (1960). But if petitioners mean that the considered views of the 95th Congress about the interpretation of a statute passed by the 90th Congress should be ignored, petitioners are wrong.

Two considerations require caution in the use of subsequent legislative history. First, the Members of Congress (or their staffs) who write the subsequent reports may know no more than the courts about the intent of their predecessors. The subsequent legislative history may be produced with little review by knowledgeable legislators and without the reflection that often is necessary to understand the

meaning of statutes. Second, it would be inappropriate to allow Congress to alter the meaning of its statutes by a process that omits obtaining the consent of a majority of each chamber and the assent of the President. There is always some danger that subsequent legislative history may be the work of persons who could not get their views written into law.

But these considerations also suggest that subsequent legislative history may be useful when it reflects the views of persons who were knowledgeable about the original statute and when there is good reason to think that their views are shared by a majority of their colleagues. Subsequent legislative history is most likely to meet these tests when the statements are made in connection with new legislation that become law; then the statements are likely to demonstrate how Congress as a whole views the entire statute as amended. The legislative history can be as important in understanding why (and on what understanding) some provision was *not* amended as it is in understanding the amendments themselves.

The Senate committee report here is valuable under these standards. Six of the 15 members of the Senate committee in the 95th Congress, including Senator Javits, were on the same committee when the ADEA was enacted. All six, and all of their colleagues, joined the report. The statement was adopted by the Conference Committee. It explains the understanding of Congress at a time when the ADEA was thoroughly reexamined and amended to alter

judicial decisions that, in Congress' view, were unfaithful to the 1967 Act.[19] The report explains why Section 14(b) was not amended: because the committees believed the provision to have a particular meaning and because, although the cases were not unanimous, some supported that interpretation. It is fair to assume in these circumstances that the statute would have been amended to conform to the committee's views but for the fact that Congress thought an amendment unnecessary. It is not often that subsequent legislative history is so clear and so likely to be probative. Here, as in other cases, the committee's statement offers a "pertinent" guide to the meaning of the statute. *Haynes* v. *United States*, 390 U.S. 85, 87 n.4 (1968).[20]

* * * * *

[19] For example, the 1978 amendments set aside this Court's decision in *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192 (1977), on which petitioners rely. See H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 8 (1978).

[20] See also *International Brotherhood of Teamsters* v. *Daniel*, No. 77-753 (Jan. 16, 1978), slip op. 17 (relying on enactment of a subsequent statute to clarify meaning of securities legislation); *Califano* v. *Sanders*, 430 U.S. 99 (1977) (relying on enactment of 1976 statute to clarify meaning of a jurisdictional statute enacted in 1948); *Commissioner* v. *Bilder*, 369 U.S. 499, 503-504 (1962) (relying on statements of an oversight committee to contradict the apparently clear terms of the statute). Cf. *Hart* v. *United States*, 585 F.2d 1025, 1037-1041 (Ct. Cl. 1978) (Davis and Friedman, JJ., dissenting).

Cases in which this Court has concluded that subsequent legislative statements should not be followed involved much less trustworthy circumstances. For example, in *TVA* v. *Hill*, No. 76-1701 (June 15, 1978), the subsequent comments took

In sum, although the language of Section 14(b) is "admittedly less than a model of clarity" (*Gabriele* v. *Chrysler Corp.*, 573 F.2d 949, 955 (6th Cir. 1978), petition for cert. pending, No. 78-1), the statute does not explicitly require an aggrieved person to resort to state remedies before filing a federal suit. Such a precondition has been found in a parallel provision of Title VII, but the procedural rules of the ADEA are sufficiently different from those of Title VII that an unyielding requirement of resort to state administrative procedures would set wheels in motion for little purpose other than "the creation of an ad-

place during the appropriations process rather than during amendment of the substantive statute. In *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958), petitioner relied on 1918 amendments to an act passed in 1863, and the Court observed that this lapse of time made the later statements unreliable. In *United States* v. *United Mine Workers*, 330 U.S. 258, 281-282 (1947), the Court found debate on a 1943 statute of little value in interpreting a 1932 statute not only because the 1943 act was a completely different statute but also because the statements in question were those of individual Senators, none of whom was on the committee that drafted the 1932 statute. In *United States* v. *Price*, *supra*, legislative history of the 1954 Internal Revenue Code was deemed a poor ground for the interpretation of the 1939 Code because none of the 1954 statements was sufficiently clear. And in *United Air Lines, Inc.* v. *McMann*, *supra*, 434 U.S. at 200 n.7, on which petitioners rely, the Court disregarded some statements made in connection with the 1977 review of the ADEA not only because they were not part of the 1967 legislative history but also because the Court found them to be flatly inconsistent with statements made in 1967. Here, however, the 1967 history is not inconsistent with the statements on which we rely; indeed, what legislative history there is supports the position we take.

ditional procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love* v. *Pullman Co.*, *supra*, 404 U.S. at 526-527 (footnote omitted).

The 1967 legislative history does not support the construction petitioners give to the statute, and the history of the 1978 amendments to the ADEA explicitly disavows petitioners' position. The ADEA is "remedial legislation [that] is entitled to be liberally construed," and the courts "should be chary about creating * * * procedural bars which may, at the outset, require the dismissal of otherwise meritorious age discrimination claims." *Holliday* v. *Ketchum, MacLeod & Grove, Inc.*, 584 F.2d 1221, 1229-1230 (3d Cir. 1978) (en banc). This Court has declined, in another context, to "engraft on [a] statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-799 (1973). See also *Love* v. *Pullman Co.*, *supra*. It should decline petitioners' invitations as well.

II

EVEN IF AGGRIEVED PERSONS SHOULD PURSUE STATE REMEDIES, THAT REQUIREMENT IS NOT JURISDICTIONAL

If, contrary to our submission, the Court should conclude that Section 14(b) requires every person to resort to any available state administrative remedy for age discrimination, it will be necessary to consider whether that requirement sometimes may be excused. The Eighth Circuit's initial opinion, and Judge Bright's opinion dissenting from the court's opinion on rehearing, conclude that any requirement of resort to state procedures "may be subject to equitable modification when necessary to effect the broad remedial purposes of the statute." Pet. App. A21; see also *id.* at A12-A13. Accord, *Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187, 194 (3d Cir. 1977). We agree with this position.[21] Consequently, if the Court should hold that Section 14(b) requires the invocation of state remedies, it should remand for a determination whether respondent's neglect may be excused, rather than for the dismissal of the complaint. The Court also could remand to allow respondent to pursue his state remedies; the district court could hold the case in abeyance while respondent sought state relief.

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[21] The rationale for this position is the same as the justification for judicial tolling of a statute of limitations when necessary to do substantial justice. See *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974). See also *Dartt* v. *Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), aff'd by an equally divided Court, 434 U.S. 99 (1977), which holds that the failure of an aggrieved person to file with the Secretary a timely notice of intent to sue under the ADEA may be excused in some circumstances. The position also is supported by cases that hold suits in abeyance pending exhaustion of administrative remedies; any requirement of resort to state administrative procedures is more closely related to an exhaustion rule than to a jurisdictional precondition to suit. Cf. *Hayes* v. *Secretary of Defense*, 515 F.2d 668, 675 (D.C. Cir. 1975).

The Court has followed this path in a case under Title VII. In *Crosslin* v. *Mountain States Telephone & Telegraph Co.*, 400 U.S. 1004 (1971), the plaintiff filed with the EEOC a charge of discrimination and later filed a federal suit under Title VII. The defendant moved to dismiss the complaint on the ground that the court lacked jurisdiction because the plaintiff has not first resorted to remedies under state law. The court of appeals held that the failure to seek administrative relief from state officials left the district court "without jurisdiction to entertain suit" (422 F.2d 1028, 1032 (9th Cir. 1970)) and accordingly required dismissal without regard to the reasons for plaintiff's neglect. Plaintiff sought review by this Court, and the Solicitor General filed a brief as *amicus curiae* suggesting that the case be remanded to the district court so that it could retain jurisdiction while the plaintiff initiated state proceedings. This Court granted the petition, vacated the judgment, and ordered the case remanded to the district court "for reconsideration in light of [the] suggestion[] contained in the [brief] of the Solicitor General" (400 U.S. at 1004).[22] It should offer respondent

[22] The district court followed the Solicitor General's suggestion (4 F.E.P. Cases 32 (1971)), as did the Ninth Circuit in later cases. *Motorola, Inc.* v. *EEOC*, 460 F.2d 1245, 1246 (9th Cir. 1972); *Parker* v. *General Telephone Co.*, 476 F.2d 595 (9th Cir. 1973); *Oubichon* v. *North American Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973). Accord, *Mitchell* v. *Mid-Continent Spring Co.*, 466 F.2d 24 (6th Cir. 1972), cert. denied, 410 U.S. 928 (1973). See also *Waters* v. *Heublein, Inc.*, 547 F.2d 466, 468 (9th Cir. 1976), cert. denied, 433 U.S. 915 (1977); *EEOC* v. *Wah Chang Albany Corp.*, 499 F.2d 187, 189 n.3 (9th Cir. 1974).

and the district court in this case a similar opportunity, in light of respondent's argument that "he had relied on official advice from the Department of Labor that the only requirement under the ADEA was notice to the Secretary of Labor" (Pet. App. A21).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-275

OSCAR MAYER & CO., *et al.*, *Petitioners*,

v.

JOSEPH W. EVANS, *Respondent*.

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTEREST OF THE AMICUS CURIAE *

The Chamber of Commerce of the United States of America (hereinafter the Chamber), a nonprofit corporation organized and existing under the laws of the District of Columbia, is the largest federation of business, trade and professional organizations in the United States. It has a total membership in excess of 78,500 enterprises and organizations, including more than 3,800 state and local chambers of commerce and trade associations, and more than 74,000 corporations, partnerships, proprietorships and individuals. In the past, the Chamber has frequently represented its member-

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* Pursuant to Rule 42, all parties have granted permission for the filing of this brief *amicus curiae.*

ship before this Court in cases posing issues of critical importance to the business community.[1]

The issue in this case, whether Section 14(b)[2] of the Age Discrimination in Employment Act[3] (hereinafter ADEA) requires an individual in a state with an age discrimination law to file a complaint with the appropriate state agency in order to preserve his right to file an action in federal court, is of vital concern to the Chamber and its membership. Chamber members employ a large segment of the labor force and are directly affected by the procedures applicable to the resolution of allegations of age discrimination. It is in the best interest of all affected parties to adhere to procedures which will effect the speediest, most equitable resolution of such complaints.

The decision below,[4] however, by providing alleged discriminatees with the option of initiating an age discrimination action with the state agency or with the Department of Labor, does not subserve the twin goals

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[1] *E.g., Marshall* v. *Barlows, Inc.*, 98 S.Ct. 1816 (1978), *University of California Regents* v. *Bakke*, 46 U.S.L.W. 4896 (June 28, 1978), *First National Bank of Boston* v. *Bellotti*, 98 S.Ct. 1407 (1978).

[2] Section 14(b), 29 U.S.C. § 633(b) (1975) provides:

> (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, *no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law,* unless such proceedings have been earlier terminated. [emphasis added].

[3] 29 U.S.C. § 621 *et seq.* (1975).

[4] The full opinion of the Eighth Circuit appears at 580 F.2d 298 (1978).

of expedition and equity. Accordingly, the Chamber submits this brief *amicus curiae* in support of reversal of the decision of the United States Court of Appeals for the Eighth Circuit below.

ARGUMENT

The decision below provides a person alleging age discrimination with two procedural alternatives. "In our opinion", stated the court, "such an individual has the option of proceeding first before the state agency and then in federal court or of proceeding initially in the federal court without prior resort to the state agency." *Evans* v. *Oscar Mayer & Co.*, 580 F.2d at 300. In arriving at this decision, however, the Eighth Circuit conceded in its Opinion on Rehearing, as well as in its original decision, that "a definitive answer [as to which option is proper under ADEA] cannot be found in either the language of the statute, its legislative history, or the policy behind it." *Ibid.; Evans* v. *Oscar Mayer & Co.*, No. 77-1692 (8th Cir. April 15, 1978).[5] The Chamber respectfully submits that an examination of the following policy considerations mandates that an alleged discriminatee initiate state agency proceedings before filing an action in federal court.[6]

At the outset, it must be noted that both options provided by the Eighth Circuit require a complainant

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[5] Not officially reported, but this decision appears in the Appendix to the Petition for a Writ of Certiorari at A10.

[6] The Chamber believes that the language of ADEA, as well as its history and policy, requires the institution of state proceedings by an individual before he may file an action in federal court and supports the arguments made by Petitioners on these issues and will not address them in this brief *amicus curiae*.

whose ultimate objective is to bring an action in federal court to file a charge with the Secretary of Labor sixty (60) days prior to the commencement of such action. *See* Section 7(d) of the Act.[7] The complainant who initially files with a state agency may also simultaneously file a charge with the Department of Labor. Thus, regardless of the procedural alternative selected, the complainant is required to wait only 60 days before he may pursue his rights in federal court. Requiring the complainant to initiate state proceedings before commencing any federal court action, then, does not prejudice the complainant.

Furthermore, it is reasonable to assume that most complainants, as well as their employers, would prefer

[7] Section 7(d), 29 U.S.C. § 626(d) (1975) provides:

> No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination under State law, whichever is earlier.
>
> Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.

The language of this section was amended to provide that a "charge" rather than a "notice of intent to sue" be filed with the Secretary of Labor. Age Discrimination in Employment Act Amendments of 1978, P.L. 95-256 (amending 29 U.S.C. § 626(d)). The procedural prerequisites to a private action, however, remain the same.

to avoid the time and expense associated with federal court litigation if it were possible to achieve an equitable resolution of the dispute through less drastic and more economical procedures. It is also indisputable that public policy favors nonjudicial resolutions whenever possible. While both the Department of Labor and most states provide conciliation procedures to the parties in lieu of litigation,[8] the Chamber respectfully suggests that state procedures and remedies, as a practical matter, generally provide a superior alternative for all parties to the dispute.

Over the past nine years, the number of age discrimination complaints filed with the Department of Labor has increased dramatically.[9] This meteoric rise in the number of complaints filed with the Department has been accompanied by a corresponding increase in the backlog of ADEA complaints.[10] This enormous case-

[8] By 1977, 44 jurisdictions, including the District of Columbia and Guam, had age discrimination laws. U.S. Department of Labor, Employment Standards Administration, Age Discrimination in Employment Act of 1967, A Report Covering Activities Under the Act During 1977 Submitted to Congress in 1978 in accordance with Section 13 of the Act at 10 (1978) (hereinafter DOL Report).

State statutes authorizing conciliation procedures in the hope of settling age discrimination claims include Md. Ann. Code, Article 49B, § 13b (1972), Mass. Ann. Laws, ch. 151b, § 3 (6) (West 1976), Mich. Stat. Ann. § 3.548(60) (1978), N.Y. Exec. Law § 297(3) (McKinney 1972).

[9] Department of Labor figures indicate that in fiscal year 1969, ADEA complaints numbered 1,031, while in fiscal year 1977 such complaints numbered 5,054. With the increase in complaints, the number of complaint actions rose from 662 in fiscal year 1969 to 6,630 in 1976. DOL Report at 6.

[10] *Id.* at 7. The Department of Labor admits that the end of year complaint backlog rose from 344 in 1971 to 2,190 at the end of the fiscal year 1977.

load and the steadily rising backlog of cases prevents the Department from fulfilling the purpose and intent of Congress in passing ADEA,[11] since, inevitably, many complainants must encounter long delays before the Department can institute informal methods of conciliation pursuant to Section 7(d). Accordingly, both employers and complainants would benefit from alternative settlement procedures.

State procedures and remedies, by contrast, are a virtually untapped resource for individuals with age discrimination claims.[12] Furthermore, as the Department of Labor itself admits, although ADEA was enacted in 1967 because state laws before that time were "ineffective in dealing with the problems of the older workers", increased state activity presently does afford protection to many older workers. DOL Report, *supra* at 10. Indeed, as the Second Circuit noted in *Reich* v. *Dow Badische Co. et al.*, 575 F.2d 363 (1978), state agencies can provide complainants with a "full and adequate system of relief". *Id.* at 370.

[11] The purpose of ADEA is to:

"promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment . . ." 29 U.S.C. § 621(b) (1975).

[12] The following representative sample of state agencies authorized by law to handle age discrimination complaints shows that quantitatively, such agencies carry a much lighter case-load than the Department of Labor.

Maryland, for example, received the following number of complaints involving age since 1973:

FY 1973	FY 1974	FY 1975	FY 1976	FY 1977	5-year Total
32	46	67	57	83	285

The 1978 Annual Report, Maryland Commission on Human Relations 14 (1978).

The District of Columbia received only a total of 8 complaints based on age discrimination in fiscal year 1975, District of Columbia Office of Human Rights Fiscal Year 1975 Annual Report 9. Eighteen such complaints were received from July 1, 1975 to September 30, 1976. District of Columbia Office of Human Rights and Commission on Human Rights, Fiscal Year 1976 Annual Report 10.

In California, for Fiscal Year 1973-74, only 264 complaints involving age discrimination were docketed, while 313 such complaints were docketed in Fiscal Year 1974-75. Information obtained from the California State Fair Employment Practices Division.

The rules governing the procedure and practice of the District of Columbia Office of Human Rights and Commission on Human Rights in relation to complaints alleging unlawful discriminatory practices are illustrative of this finding.[14]

In the District of Columbia, an employee must file a complaint with the Office within one year from the date of the alleged unlawful discriminatory practice. The Office is then required to investigate promptly the allegations made in the complaint, and to inform the respondent of the nature of the charges made against him. At any time during the pendency of the complaint, and and prior to the issuance of a final order, the Director of the Office may attempt to settle the complaint by conciliation.

If efforts to eliminate the unlawful practice by conciliation are unsuccessful, a hearing is held before a Hearing Tribunal, consisting of three members of the Commission. The Tribunal has full authority to control the procedures of the hearing, to rule upon motions and objections, and to admit or exclude testimony or other

[14] The rules and regulations appear in the District of Columbia Register, Title 8.

evidence. At the hearing, each party has the right to call, examine and cross-examine witnesses, to offer papers, documents and other evidence for the record, and to file briefs, memoranda, and proposed orders within time limits established by the Tribunal.

After the case is heard, the parties are served with a proposed order or decision, including findings of fact and conclusions of law, and a notice that parties adversely affected may present argument to the Commissioners within ten days from the date of service of the proposed order. When a final decision and order is served upon the parties, they may apply to the Tribunal for reconsideration of that decision. Finally, upon completion of the aforementioned administrative proceedings, any party adversely affected by the final decision of the Commission may file a petition for review with the District of Columbia Court of Appeals.

Hence, as the District of Columbia procedures illustrate, it is clear that the states can and do provide alleged discriminatees with more than adequate relief.

Finally, requiring an employee to file initially at the state level would also do much to ease the current burden on the federal courts. This burden, exemplified by a staggering caseload, is the subject of numerous articles and debate.[15] State conciliation procedures, by

[15] Judge Richard C. Freeman, United States District Judge for the Northern District of Georgia, has said:

> At every level, courts in populous areas of our country are overcrowded; there are too few judges and supporting personnel to accommodate a litigious society. 13 Georgia State Bar Journal 130 (February 1977).

The Honorable Morris C. Lasker, United States District Judge for the Southern District of New York concurs:

> The crisis facing the federal courts—and perhaps other American courts even more—consists not only in delay, although delay is by itself a pernicious factor. It consists rather in the courts' approaching—if not present—inability to dispose of cases on the studied, deliberate basis which alone can assure the just determination of disputes. The Court Crunch: A View From the Bench, 76 FRD 245 (1978).

providing the parties with an additional opportunity to settle their dispute out of court, could help decrease this caseload. The Chamber respectfully submits that the ability of the states to aid the federal courts in this way should not be ignored.

Current figures indicate that one civil case out of every ten in federal district courts around the country has been pending for more than three years. *Business Week*, December 4, 1978 at 100. While the recently enacted Act of October 20, 1978, P.L. 95-486, 92 Stat. 1629, which authorized 152 new district and circuit court positions, will do much to improve these figures, relief provided by state anti-age discrimination statutes can also serve to alleviate the current problems faced by the federal court system.

CONCLUSION

For the reasons set forth above, the Chamber, as *amicus curiae,* respectfully requests that the decision of the Eighth Circuit below be reversed.

Respectfully submitted,

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